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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 250

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

NEW WRINKLE, INC., AND THE KAY & ESS COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

FILED AUGUST 17, 1951.

PROBABLE JURISDICTION NOTED OCTOBER 8, 1951.

SUPREME COURT OF THE UNITED STATES

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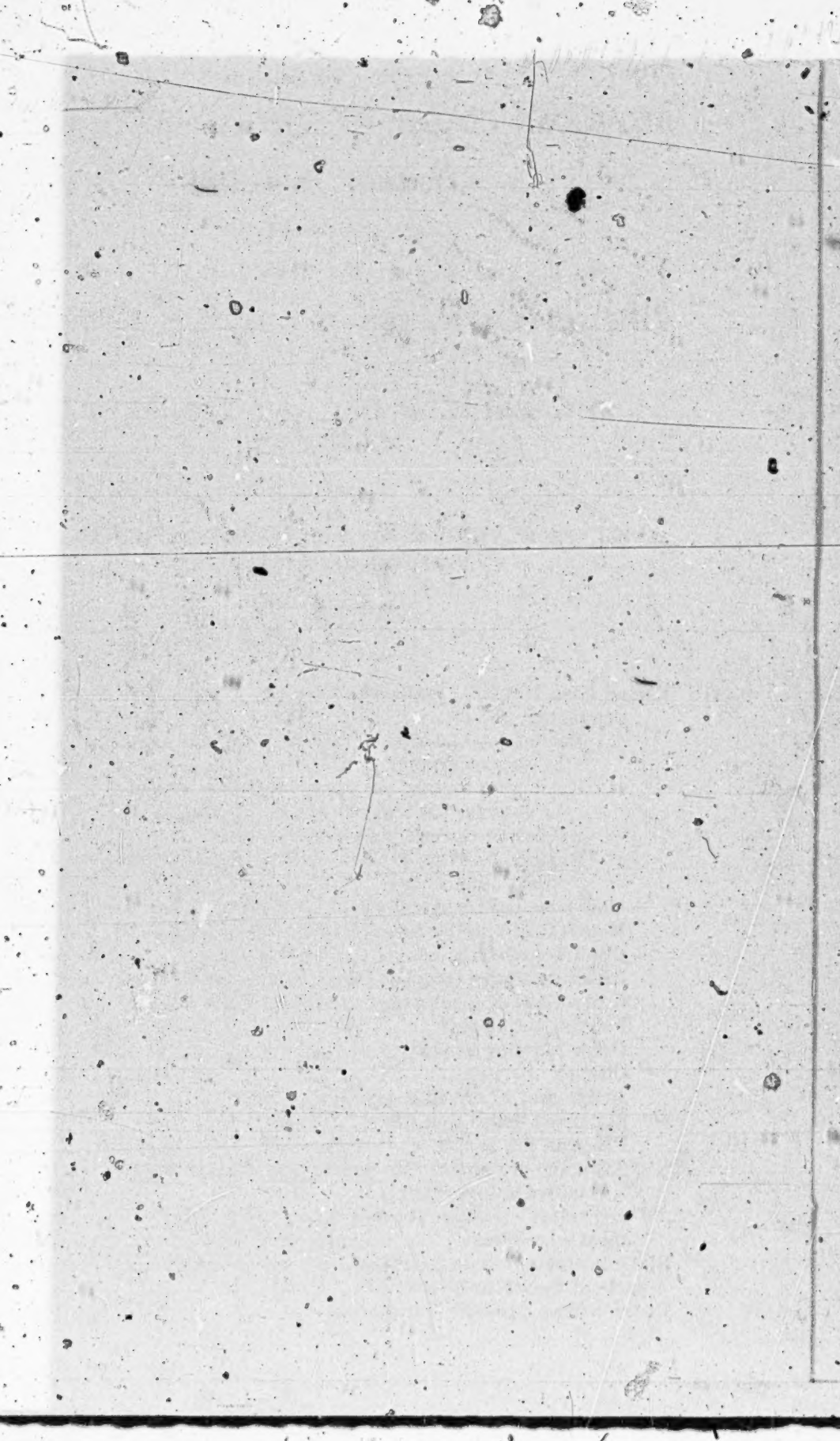

1 [File endorsement omitted]

In United States District Court for the Southern District of Ohio

Civil Action No. 2278

UNITED STATES OF AMERICA, PLAINTIFF

v.

NEW WRINKLE, INC. AND THE KAY & ESS COMPANY, DEFENDANTS

COMPLAINT—Filed September 21, 1948

The United States of America, by its attorneys, acting under the direction of the Attorney General, brings this action against the defendants and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and this action is instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Act," in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of said Act.

2. Each of the defendants transacts business within the Southern District of Ohio and is found therein.

II

The Defendants and Co-Conspirators

Defendants

3. New Wrinkle, Inc., hereinafter referred to as New Wrinkle, a corporation organized and existing under the laws of the State of Delaware, with its principal offices at Dayton, Ohio, is made a defendant herein.

2 4. Kay & Ess Company, hereinafter referred to as K & S, a corporation organized and existing under the laws of Ohio, with its principal offices at Dayton, Ohio, is made a defendant herein.

Co-Conspirators

5. Chadeloid Chemical Company, hereinafter referred to as Chadeloid, a corporation organized under the laws of West Virginia, is not made a defendant, but is named a co-conspirator herein.

Chadeloid was dissolved in or about the year 1945 and its assets distributed among its stockholders.

6. The manufacturing concerns listed on Exhibit A attached to this complaint are not made defendants, but are named co-conspirators herein. Each is, or has been during the period covered by this complaint, a licensee under the wrinkle finish patent rights owned or controlled by New Wrinkle, Inc., and each is, or has been during that period, engaged in manufacturing and selling wrinkle finishes, as defined below.

7. Certain individuals from time to time associated with or acting on behalf of one or more of the defendants or co-conspirators have also acted as co-conspirators in the offenses charged herein.

III

Nature of the Trade and Commerce Involved.

8. "Wrinkle" finishes, also known as "Crinkle," "Shrivel," "Sag," "Morocco," and by other designations, are defined as enamels, varnishes and paints which have been compounded from such materials and by such methods as to produce when applied and dried, a hard wrinkled surface on metal or other material.

9. Wrinkle finishes are widely used as coverings for the surfaces of typewriters, cash registers, motors, adding machines, and many other articles of manufacture. They have the following advantages over smooth finishes such as ordinary enamels and varnishes:

a. One coat of wrinkle finish is sufficient for many purposes for which two or more coats of smooth finish would be required;

b. Surfaces to which wrinkle finishes are to be applied need not be prepared as carefully as those which are to receive smooth finishes, since the wrinkle finishes cover small imperfections; and

c. The original appearance of wrinkle-finished articles can be maintained with less cleaning and polishing than that of smooth-finished articles.

10. Wrinkle finishes are being produced and sold in the United States at the rate of approximately one million gallons per year and the manufacturers thereof receive in excess of two million dollars per year for these products.

11. New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1937. However, it owns or controls patents relating to wrinkle finishes, and since 1938, has licensed and now licenses in excess of 200 manufacturing concerns to make, use, and sell wrinkle finishes under those patents.

12. Substantially all wrinkle finishes produced in the United States are manufactured by these licensees, whose places of business are located in principal cities throughout the various states. A substantial portion of the wrinkle finishes made by licensees is sold to purchasers in states other than those in which the finishes are manufactured and to purchasers in the Dominion of Canada, and is shipped from one state to another, and from various states of the United States to various locations in the Dominion of Canada in the ordinary course of business.

IV

Offenses Charged

13. For many years, the defendants and co-conspirators have been continuously and are now engaged in an unlawful combination and conspiracy, and have been continuously and are now parties to unlawful contracts, in restraint of trade and commerce in wrinkle finishes among the several states of the United States and between various states of the United States and the Dominion of Canada, all in violation of Section 1 of the Sherman Act. The defendants and co-conspirators are continuing, and threaten to and will continue said offenses unless the relief hereinafter prayed for in this complaint is granted. The aforesaid combination and conspiracy, and certain of the contracts, agreements, arrangements and understandings which formed a part and were used in effectuation thereof will be hereinafter more fully set forth and described.

14. In 1937, and for some time prior thereto, K & S and Chadeloid had been engaged in litigation with respect to various patents on wrinkle finishes. Chadeloid held certain patents which it alleged were basic; K & S held other patents which it alleged provided for more economical and efficient means of producing wrinkle finishes, but which Chadeloid contended were subservient to the basic patents held by Chadeloid.

15. During 1937 representatives of K & S and Chadeloid negotiated with each other with a view toward effecting a pooling of the patents of the two corporations in order to eliminate competition between them and to set up a licensing system under which prices for the entire wrinkle finish industry would be fixed.

16. As a result of these negotiations, on or about November 2, 1937, K & S and Chadeloid entered into a contract providing for the formation of a new company to be known as New Wrinkle, Inc., to which K & S and Chadeloid each agreed to assign all of its patent rights relating to wrinkle finishes in return for common and preferred stock in the new corporation. The contract further provided that non-exclusive licenses under all the wrinkle finish patent rights

previously held by K & S and Chadeloid would be granted by New Wrinkle to Chadeloid, K & S, and other manufacturers of wrinkle finishes, and that minimum prices at which all licensed manufacturers might sell would be fixed by New Wrinkle. Attached to the contract was a list of the principal companies then engaged in the manufacture and sale of wrinkle finishes and it was expressly agreed that the price schedules would not be made effective until the Sherwin-Williams Company, a corporation of Ohio with its general office at Cleveland, Ohio, and any eleven of the other companies on the list had signed the contract and agreed to follow the minimum prices. A copy of the list is attached to and made a part of this complaint as Exhibit B.

17. After the formation of New Wrinkle, and the transfer to it of the patent rights previously held by K & S and Chadeloid, provided for in the aforesaid contract of November 2, 1937, the new corporation caused its stock to be issued on the following basis:

To K & S: 150 shares of preferred and 51% of the common stock.

To Chadeloid and its nominee: 400 shares of the preferred, and 49% of the common stock.

18. After the execution of the aforesaid contract, representatives of K & S and of Chadeloid worked together and with representatives of certain of the companies named as co-conspirators to induce the other companies in the industry to accept licenses from New Wrinkle in order that competitive practices deemed by them to be undesirable might be eliminated. Prospective licensees were advised that other prospective licensees had been and were being consulted in order to establish minimum prices throughout the industry.

19. Meetings were held between representatives of K & S and Chadeloid and of certain of the co-conspirators at which terms of the license agreements were agreed upon, and prices, terms, and conditions of sale were discussed. Licenses were then executed between New Wrinkle and certain of the con-conspirators; but as provided in the contract of November 2, 1937, price schedules were not put into effect until the Sherwin-Williams Company and eleven other of the specified companies listed in the contract had agreed to accept such licenses. On or about May 7, 1938, the required number of manufacturing companies having signed such agreements, the price schedules were made effective.

20. The license agreements between New Wrinkle and defendant K & S and between New Wrinkle and the other licensed manufacturers of wrinkle finish provide, among other things, that:

a. Each licensee is licensed under New Wrinkle patents to make, use and sell wrinkle finishes;

b. Each licensee, in its sales of wrinkle finishes, is required to sell such finishes at not less than the minimum prices and discounts and on selling terms no more favorable than those established and to be established by New Wrinkle, except when selling to other licensees;

c. Each licensee agrees to pay a royalty of five cents per gallon on wrinkle finishes which it sells or uses;

d. Prices, terms and conditions of sale may be changed by New Wrinkle on 30 days' notice to each licensee and each licensee may cancel the agreement by giving written notice at any time during this 30-day period.

21. From time to time after May 7, 1938, knowing that concerted action among the defendants and co-conspirators was contemplated and required in order to carry out and maintain the aforesaid illegal combination and conspiracy of the aforesaid illegal contracts, other companies accepted licenses containing provisions similar to those described in paragraph 20 above. All of the license agreements are substantially identical. A copy of one of such agreements is attached to and made a part of this complaint as Exhibit C.

7 22. New Wrinkle, with the advice and consent of its licensees, from time to time has issued to all of such licensees schedules of minimum prices, terms and conditions of sale to be followed by each licensee in its sales of wrinkle finishes. Each licensee thereafter adhered to the minimum prices, terms and conditions of sale set forth in those schedules. A copy of the schedule in effect at the present time is attached to and made a part of this complaint as Exhibit D.

V

Effect of the Combination and Conspiracy and the Contracts

23. The combination and conspiracy and the contracts, and the acts done in effectuation thereof, hereinabove described, have had the effect, as intended by the defendants and co-conspirators, of fixing and maintaining identical and unreasonably high and arbitrary minimum prices, discounts and selling conditions and terms for substantially all wrinkle finishes manufactured and sold in the United States, and of eliminating competition between the defendants and co-conspirators in the sale of such finishes.

Relief

WHEREFORE, plaintiff demands:

(1) That the aforesaid combination and conspiracy and contracts be adjudged and decreed to be unlawful and in violation of Section 1 of the Sherman Act.

(2) That the aforesaid contracts and license agreements between the defendants and between the defendants, or either of them, and one or more of the co-conspirators, be declared to be illegal and be ordered terminated and cancelled.

(3) That the defendants and their officers, directors, agents,
8 representatives, successors, assigns, and all persons and corporations acting on behalf of them or either of them be perpetually enjoined from combining, conspiring or agreeing to restrain trade and commerce in wrinkle finishes among the several states of the United States and with foreign nations, and that they be perpetually enjoined from engaging in or participating in practices, contracts, relationships or understandings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing any of the aforesaid violations of the Sherman Act.

(4) That the Court adjudge and decree that the defendants have used their patent rights unlawfully in instituting, effectuating, and maintaining the aforesaid combination and conspiracy and the aforesaid unlawful contracts, and enter such orders relating to any and all of their patent rights as the Court may deem appropriate and necessary to dissipate the effects of the unlawful combination and conspiracy, contracts and activities herein alleged, and to establish free and unfettered competition in the trade and commerce herein described.

(5) That the plaintiff have such further, general and different relief as the nature of the case may require and the Court may deem proper in the premises.

(S.) ROBERT A. NITSCHKE,
Special Assistant to the Attorney General.

(S.) JOHN S. JAMES,
(S.) FRANK W. GAINES, JR.,
Special Attorneys.

(S.) TOM C. CLARK,
Attorney General.

(S.) HERBERT A. BERGSON,
Assistant Attorney General.

(S.) GEORGE L. DERR,
Special Attorney.

(S.) RAY J. O'DONNELL,
United States Attorney.

9 EXHIBIT "A"—TO COMPLAINT

Manufacturing Concerns, Location

Acme White Lead & Color Works, Detroit, Michigan.
The Advance Paint Company, Indianapolis, Indiana.
Akron Paint & Varnish Co., Akron, Ohio.
Aktiebolaget Wilh. Becker, Stockholm, Sweden.
Allied Finishing Specialties Co., Chicago, Illinois.
Alston-Lucas Paint Company, Chicago, Illinois.
American-Marietta Company, Chicago, Illinois.
American Paint Company, Chicago, Illinois.
The Anglo-American Varnish Co., Newark, New Jersey.
The Arco Company, Cleveland, Ohio.
Arco Company of California, Ltd., Los Angeles, California.
Atlas Powder Company, Wilmington, Delaware.
Baer Brothers, New York, New York.
Baltimore Paint & Color Works, Inc., Baltimore, Maryland.
Barrett Varnish Co., Cicero, Illinois.
R. A. Becker Paint & Varnish Co., Cincinnati, Ohio.
Berry Brothers, Inc., Detroit, Michigan.
Better Finishes & Coatings, Inc., Newark, New Jersey.
Bigelow Varnish Co., Newark, New Jersey.
Boston Varnish Company, Everett, Massachusetts.
The Boydell Bros. Company, Detroit, Michigan.
Braddock Paint & Glass Co., Braddock, Pennsylvania.
Bradley & Vrooman Co., Chicago, Illinois.
Bradley Wise Paint Company, Los Angeles, California.
Breinig Bros. Inc., Hoboken, New Jersey.
Brimstool Paint Company, Los Angeles, California.
Andrew Brown Co., Los Angeles, California.
John L. Armitage & Company, Newark, New Jersey.
The Burdsal Co., Indianapolis, Indiana.
A. C. Buschman & Co., Inc., Newark, New Jersey.
California Paint Company, San Francisco, California.
10 Capitol Chemical Co., Chicago, Illinois.
John G. Carlsen & Company, Chicago, Illinois.
Chemical and Pigment Co., Inc., Cleveland, Ohio.
Chemical Coatings Corp., Rocky Hill, Connecticut.
The Cincinnati Varnish Co., Inc., Cincinnati, Ohio.
Cleveland Paint and Color Co., Cleveland, Ohio.
The Clinton Co., Chicago, Illinois.
Clover Leaf Paint & Varnish Co., Long Island City, New York.
Coatings Materials Lab. Inc., Bellevue, New Jersey.
The Columbus Varnish Co., Inc., Columbus, Ohio.
Con-Ferro Paint & Varnish Co., St. Louis, Missouri.
Cook Paint & Varnish Co., Kansas City, Missouri.

Manufacturing Concerns, Location

Crescent Ink & Color Co. of Pa., Philadelphia, Pennsylvania.
Don V. Davis Company, St. Louis, Missouri.
De Sota Paint & Varnish Co., Memphis, Tennessee.
Detroit Graphite Co., Detroit, Michigan.
Devoe & Reynolds Co., Inc., New York, New York.
Dibble Color Company, Detroit, Michigan.
V. J. Dolan & Co., Inc., Chicago, Illinois.
The F. J. Donahue Varnish Co., Detroit, Michigan.
Drexel Finishes Co., Philadelphia, Pennsylvania.
Duralac Chemical Company, Newark, New Jersey.
Eagle Paint & Varnish Works, Pittsburgh, Pennsylvania.
Eastern States Paint & Varnish Co., Philadelphia, Pennsylvania.
Egyptian Lacquer Mfg. Co., Inc., South Kearney, New Jersey.
Enterprise Paint Mfg. Co., Chicago, Illinois.
The Farboil Paint Company, Baltimore, Maryland
Felton, Sibley & Co., Inc., Philadelphia, Pennsylvania.
11 The Ferbert-Schorndorfer Co., Cleveland, Ohio.
Leon Finch, Ltd., Los Angeles, California.
Flint Paint and Glass Co., Flint, Michigan.
Flood & Conklin Company, Newark, New Jersey.
Forman, Ford & Company, Minneapolis, Minnesota.
The Foy Paint Company, Cincinnati, Ohio.
D. C. Franche & Co., Chicago, Illinois.
Benj. Franklin Paint & Varnish Co., Philadelphia, Pennsylvania.
Frost Paint & Oil Corp., Minneapolis, Minnesota.
W. P. Fuller Company, San Francisco, California.
General Finishes, Inc., Minneapolis, Minnesota.
General Paint Corporation, San Francisco, California.
P. D. George Company, St. Louis, Missouri.
The Glidden Company, Cleveland, Ohio.
Grand Rapids Varnish Corp., Grand Rapids, Michigan.
C. W. Haynes Laboratories, Inc., Springfield, Massachusetts.
Hilo Varnish Corp., Brooklyn, New York.
Homestead Paint and Glass Co., Homestead, Pennsylvania.
A. C. Horn Co., Inc., Long Island City, New York.
Illinois Paint Works, Chicago, Illinois.
Impervious Varnish Co., Rochester, New York.
India Paint & Lacquer Co., Los Angeles, California.
Indianapolis Paint & Color Co., Indianapolis, Indiana.
Indianapolis Varnish Co., Inc., Indianapolis, Indiana.
Interchemical Corp., Finishes Div., New York, New York.
Inter-Coastal Paint Co., Baltimore, Maryland.
Jamestown Finishing Products Inc., Jamestown, New York.
Jamestown Paint & Varnish Co., Jamestown, Pennsylvania.
Jewel Paint & Varnish Co., Chicago, Illinois.

Manufacturing Concerns, Location

John Lucas & Company, Inc., Philadelphia, Pennsylvania.
R. F. Johnson Paint Co., Cincinnati, Ohio.
12 Jones-Dabney Co., Louisville, Kentucky.
Jones & Dillingham Co., Spokane, Washington.
Kellerman Paint Company, New York, New York.
Lacquer & Chemical Corp., Brooklyn, New York.
Lasting Products Company, Baltimore, Maryland.
W. W. Lawrence Company, Pittsburgh, Pennsylvania.
Lilly Varnish Company, Indianapolis, Indiana.
Lincoln Paint & Color Co., Lincoln, Nebraska.
The Lino Paint Co., Cleveland, Ohio.
Chas. R. Long, Jr. Company, Louisville, Kentucky.
The Lowe Bros. Co., Dayton, Ohio.
Maas & Waldstein Co., Newark, New Jersey.
Mansfield Paint Co., Mansfield, Ohio.
The Marietta Paint & Color Co., Marietta, Ohio.
Martin-Senour Company, Chicago, Illinois.
Martin Varnish Co., Chicago, Illinois.
Charles Maser Company, Lyons, Illinois.
Mileti Company, Louisville, Kentucky.
Minnesota Linseed Oil Paint Co., Minneapolis, Minnesota.
The Monroe Sander Corp., Long Island City, New York.
R. N. Nason & Co., San Francisco, California.
National Mfg. Corp., North Tonawanda, New York.
New England Lacquer Co., Providence, Rhode Island.
Newark Varnish Company, Newark, New Jersey.
A. P. Nonweiler Co., Oshkosh, Wisconsin.
Ohio Paint & Glass Company, Bellaire, Ohio.
Pacific Paint & Varnish Co., San Francisco, California.
Palmer-Price Company, Newark, New Jersey.
The Patterson-Sargent Co., Cleveland, Ohio.
Payson Varnish Co., New York, New York.
13 Peaslee-Gaulbert Paint & Varnish Co., Louisville, Kentucky.
Peninsular Paint & Varnish Co., Detroit, Michigan.
Perry-Austen Mfg. Co., Staten Island, New York.
Phelan-Faust Paint Mfg. Co., St. Louis, Missouri.
Pittsburgh Plate Glass Co., Pittsburgh, Pennsylvania.
Pontiac Varnish Company, Pontiac, Michigan.
Pratt & Lambert, Inc., Buffalo, New York.
Premier Paint & Varnish Co., Chicago, Illinois.
Processed Chem. & Coat. Corp., Brooklyn, New York.
Randolph Finishing Products Co., Carlstadt, New Jersey.
Rasmussen and Company, Portland, Oregon.
Rinshed-Mason Company, Detroit, Michigan.

Manufacturing Concerns, Location

The Rockford Varnish Co., Rockford, Illinois.
Rogers Paint Products, Inc., Detroit, Michigan.
Royal Lacquer Co., Brooklyn, New York.
Sta-Rite Lacquer Corp, Brooklyn, New York.
The Schaefer Varnish Company, Louisville, Kentucky.
Schreiber Paint and Glass Co., Detroit, Michigan.
Seattle Company, Seattle, Washington.
Sewall Paint & Varnish Co., Kansas City, Missouri.
Sheboygan Paint Company, Sheboygan, Michigan.
Sherwin-Williams Co., Cleveland, Ohio.
Sillers Paint & Varnish Co., Inc., Los Angeles, California.
Skinner Paint & Varnish Co., Galesburg, Illinois.
Smith-Davis Paint Co., Los Angeles, California.
Sound Paint Manufacturing Co., Seattle, Washington.
The Speed-O-Lac Prod. Co., St. Paul, Minnesota.
The Gilbert Spruance Co., Philadelphia, Pennsylvania.
Standard Paint & Varnish Co., Windsor, Ontario, Canada.
Standard Varnish Works, Staten Island, New York.
Stanley Chemical Company, East Berlin, Connecticut.
14 John A. Steen Varnish Co., Chicago, Illinois.
Sterling Lacquer Mfg. Co., St. Louis, Missouri.
Stewart Brothers Paint Co., Alliance, Ohio.
Strathmore Products, Stockholm, Sweden.
Sullivan Varnish Co., Chicago, Illinois.
Sun Chemical Company, New York, New York.
Taunton Coating Mills, Inc., Taunton, Massachusetts.
Toch Brothers, Inc., Staten Island, New York.
Tomlinson Paint & Varnish Co., Chicago, Illinois.
Tousey Varnish Company, Chicago, Illinois.
Thresher Varnish Company, Dayton, Ohio.
Triangle Paint Company, Berkeley, California.
True Tagg Paint Co., Memphis, Tennessee.
Unifilm Paint Products Co., Somerville, New Jersey.
Union Chemical Company, Newark, New Jersey.
United Finish Company, Peabody, Massachusetts.
United Lacquer Mfg. Corp., Linden, New Jersey.
Universal Paint & Varnish Co., Cleveland, Ohio.
V.E.P. Company, Detroit, Michigan.
Vita-Var Corporation, Newark, New Jersey.
The Voltax Co., Inc., Bridgeport, Connecticut.
Wabash Products Co., Terre Haute, Indiana.
Wadsworth Howland & Co., Boston, Massachusetts.
Waggener Paint Company, North Kansas City, Missouri.
Wagner Brothers, San Francisco, California.
The H. V. Walker Company, Elizabeth, New Jersey.

Manufacturing Concerns, Location

Watson Paint and Glass Co., McKeesport, Pennsylvania.
Watson-Standard Company, Pittsburgh, Pennsylvania.
Western States Lacquer Corp., Los Angeles, California.
Geo. D. Wetherill & Co., Inc., Philadelphia, Pennsylvania.
The Williams-Hayward Var. Co., Summit, Illinois.
Wisconsin Paint Mfg. Co., Milwaukee, Wisconsin.
The Wyandotte Paint Products Co., Wyandotte, Michigan.
Yarnall Paint Co., Philadelphia, Pennsylvania.

15. "EXHIBIT B" TO COMPLAINT

MANUFACTURERS SPECIFIED ON PARAGRAPH 10 OF THE FOREGOING CONTRACT

It is understood that this list will be construed to include, in addition to the names recited herein, any associated, affiliated or subsidiary companies of the following manufacturers:

Armitage Varnish Company.
Sherwin Williams Company and associated companies.
Rinshed Mason Company.
Ferbert Schorndorfer Company.
Columbus Varnish Company.
Glidden Company.
Standard Varnish Company.
Lilly Varnish Company.
Cincinnati Varnish Company and associated companies.
Advance Paint Company.
Ault & Wiberg Company.
Murphy Varnish and associated companies.
Berry Brothers.
Hilo Varnish Corporation.
Boston Varnish Company.
Flood & Conklin and associated companies.
Jones-Dabney Company.
Forbes Varnish Company.
Kay & Ess Company.

Schedule "D".

EXHIBIT "C" TO COMPLAINT [illegible]

License Agreement

Exhibit "C" to complaint

This PATENT LICENSE AGREEMENT by and between NEW WRINKLE, INC., a corporation of the state of Delaware, with its principal office and place of business at Dayton, Ohio, hereinafter called the "Licensor"; and THE [redacted] a corporation of the state of [redacted], with its principal office and place of business at [redacted], hereinafter known as the "Licensee";

Witnesseth:

WHEREAS, the Licensor is the owner of the patents listed on the attached Exhibit "1";

AND WHEREAS, the Licensee is desirous of acquiring a license thereunder;

NOW THEREFORE, in consideration of One [1] Dollar and other good and valuable considerations, the receipt of which is hereby acknowledged, the parties agree as follows:

1. Upon the terms and conditions herein set forth, Licensor hereby grants to the Licensee a non-exclusive, personal and indivisible license in and for the United States of America and Dominion of Canada, to make use and sell the subject matter of the patents shown on the attached Exhibit "1", and of such other patents relating to the irregular finish known in the trade as "Wrinkle Finish" [also known as "Crinkle", "Shrivel", "Sag", "Morocco", and by other designations] as Licensor may now or hereafter during the existence of this license own or acquire for all purposes and uses except, however, for use with fabric of woven cloth or of felt or paper as to which no license is granted hereby]. Licensee shall also be entitled, upon the terms herein set forth, to a sublicense under any United States and Canadian "Wrinkle Finish" patents as to which Licensor now has or later acquires the right to grant sublicenses, such sublicense also, however, to be subject to such other and further terms and conditions upon which Licensor's right to grant sublicenses is acquired.

2. The Licensee hereby agrees to accept said license and to pay therefor a royalty of five [5] cents per gallon of wrinkle finish composition sold or used by it during the term of this agreement.

3. The Licensee agrees to pay said royalty between the first and twentieth day of each month for the gallons sold during the preceding month embodying the patented subject matter of this contract. This remittance shall be accompanied by a statement of the number of gallons sold, and books of account shall be kept open to inspection during reasonable business hours by the Licensor or its duly authorized representative, but the inspection of said books of account may, at the option of the Licensee, be by a certified public accountant under instructions not to reveal anything about the confidential business or names of customers of the Licensee.

4. The Licensee shall mark all of its advertising, containers, etc., with suitable statutory patent notices as may be specified from time to time by the Licensor, and with the statement "licensed by New-Wrinkle, Inc."

5. The term of this contract shall be ten [10] years, but may be extended for further periods from time to time upon written notice from Licensee to Licensor, given at least two months before the date when the License would otherwise terminate. Licensee may, however, terminate this license at any time upon three months written notice to Licensor. In case Licensee fails at any time to pay royalties, render statements or give access to its books and records as above provided, or otherwise violate or fail to observe the terms, conditions or covenants hereof, Licensor may terminate this license by written notice to Licensee to that effect provided Licensor has first given Licensee written notice of its violation or default and Licensee has failed for [30] days to remedy the same.

6. The Licensee hereby acknowledges the validity of the patents set forth on Exhibit "1" and agrees not to directly or indirectly contest the validity thereof during the life of this contract.

13

7. The Licensor hereby reserves and shall have the right at any time [illegible] Minimum Prices, Discounts, and Selling Terms only in accordance with which Licensee, Licensor, and all other Licensees shall thereafter sell or otherwise dispose of products covered by patents included herein, and thereafter to modify, amend and suspend any such Schedule and/or establish a New Schedule. No such original Schedule or any modification, amendment or suspension of a Schedule or any New Schedule shall go into effect until thirty [30] days notice in writing has been given to Licensee. The Licensee may by written notice to Licensor, but only if given within such thirty [30] day period, elect to cancel this contract, and if it does so, then said contract shall stand cancelled without any commitment or obligation by either party by reason of having entered into this contract. The Licensor announces as a matter of policy that it will fix said price based upon the cost of raw materials and labor as reported by the United States Department of Commerce and the United States Department of Labor, plus the royalty charged hereunder, it being the intent and purpose of the Licensor to open to the entire trade the use of these patents so licensed at the lowest price consistent with a reasonable profit to the manufacturer, Licensee, the trade, and to this Licensor. No Schedule of Minimum Prices, Discounts and Selling Terms nor any modification or amendment or suspension thereof shall be binding upon Licensee unless at the same time and in the same terms imposed upon Licensor and all other Licensees.

8. In the event that any subsequent license is granted with lower terms of royalty, said lower terms shall apply to the Licensee hereunder.

9. All previous agreements between the Licensee, with respect to any of the patents covered hereby, with Licensor's predecessors in title to such patents are hereby cancelled and terminated and Licensee is hereby relieved of any obligations under or in connection with any such previous agreements as to matters accruing hereafter.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in duplicate by their officers thereunto duly authorized and to be sealed with their corporate seals as of the day and year below written.

NEW WRINKLE, INC.

Witnesses:

M. L. Williamson

Dorothy P. Parkman

By H. Strudget
President

Attest M. L. Williamson
Ass't Secretary

10th day of February, 1938.

Signed at Dayton, Ohio

[redacted] COMPANY

Witnesses:

Doris M. Otte

Robert E. Stewart

By [redacted]
Vice-President

Attest F. J. Sheeran
Ass't Secretary

Copy No. 2

Contract No. 5

8th day of February, 1938

Signed at Phila.

EXHIBIT "1"

PATENTS OWNED BY NEW WRINKLE, Inc.

UNITED STATES PATENTS

1,689,892	Root	Oct. 30, 1928
1,732,661	Root	Oct. 22, 1929
1,831,323	Root	Nov. 10, 1931
1,864,763	Root	June 28, 1932
1,878,316	Phillippi	Sept. 20, 1932
1,883,408	Root	Oct. 18, 1932
1,896,594	Root	Feb. 7, 1933
1,936,913	Phillippi	Nov. 28, 1933
1,976,191	Root	Oct. 9, 1934
2,037,331	Kittredge et al	April 14, 1936
2,069,252	Kittredge et al	Feb. 2, 1937
2,077,112	Kittredge et al	April 13, 1937
Des. 88,001	Root	Oct. 19, 1932

CANADIAN PATENTS OWNED BY NEW WRINKLE, INC.

311,503	Root	May 19, 1931
311,504	Root	May 19, 1931

[redacted]

Exhibit "D" to complaint

NEW WRINKLE LICENSE RULINGS

FIFTH EDITION

(Superseding all Previous Editions)

PUBLISHED

June 1, 1947

To Our Licensees:

These rulings are issued for the information and guidance of all concerned. Distribution is being effected so that all licensees will be fully informed as to our existing rulings.

NEW WRINKLE, INC.
137 N. PERRY ST.
DAYTON 2, OHIO

U. S. Patents

1,689,892 — 1,722,941 — 1,831,323 — 1,864,762 — 1,878,316 — 1,883,498 — 1,893,611 — 1,896,394 — 1,936,913
1,950,417 — 1,960,164 — 1,976,191 — 1,980,309 — 1,991,527 — 1,994,529 — 2,037,331 — 2,049,252 — 2,077,112
2,126,703 — 2,154,954 — 2,236,397 — 2,236,398 — 2,268,002 — 2,268,912 — 2,268,922 — 2,275,239 — 2,283,420
2,294,702 — 2,309,595 — 2,319,022 — 2,320,513 — 2,344,189 — 2,344,807 — 2,347,303 — 2,347,304 — 2,373,177
2,373,211 — 2,373,212 — 2,381,853 — 2,387,424 — 2,389,794 — 2,389,795 — 2,392,348 — 2,394,498 — 2,394,499
2,394,500 — 2,396,389 — 2,396,361 — 2,407,823 — Design 88,001

Other patents pending

Canadian Patents: 311,503 — 311,504 — 407,866 — 410,406 — 410,407 — 412,813 — 412,814 — 412,815 — 412,816 414,922 — 415,845

NEW WRINKLE, Inc.

Licensors of Processes and Finishes

Violations

Any violations will be promptly investigated. To do this effectively, it is necessary that the facts as to names of seller and buyer, dates, products, prices, terms, etc. all be stated with considerable fullness. We cannot take action on hearsay information. Licensees will assist themselves and us by prompt reports of violations and by making these reports full and complete.

Sale of Other Products

When a licensee endeavors to influence the sale or does infulence the sale of products covered by the minimum price schedule by selling other products at special cut prices, such action constitutes a violation of the price schedule. Likewise the granting of unauthorized discounts or rebates, the placing of stocks on consignment, etc. constitute violation and will render the license subject to cancellation.

Ready For Use

The minimum price schedule and the contract carefully specify that the intent and purpose of the price schedule and license contract is to insure that all licensees sell at not less than the minimum price established so as to insure uniform and fair treatment for all licensees. It is contemplated that these finishes are to be sold in their ready to use condition without further cutting and the prices are established accordingly.

It is, therefore, established by the Licensor that 67.5% of solids by weight is fixed as the maximum solid content of all enamels ready for use except those enamels containing organic reds and maroons; and 55% of solids by weight is fixed for all enamels containing organic reds and maroons.

Supplier shall make the following determination at 60°F.: If Wrinkle Finish requires more than 10% reduction at this temperature for normal spray gun application it shall be regarded as a "concentrated material" and not "a ready for use" material and the minimum price of such "concentrated material" shall be One ($1.00) Dollar per gallon more that the established schedule of prices.

Licensees are advised that if they supply copcentrate assuming that the customer will "cut" the concentrate, the royalty payment must be based on the ultimate gallonage, after being "cut" by the customer. The responsibility will be that of the licensee. Selling concentrate is most unusual. The licensee will be held under the strictest obligation to give a report of it, name and place and price so made to the customer, specifying the customer and all data of the transaction. The licensor warns against this practice as injurious to the public, the licensee and the licensor because of the difficulty of control of the quantity of the product if the product should be completed ready for use by the customer instead of in the licensee's own plant.

Clear Wrinkle Converted by Customer into Color Enamel

This practice is very injurious to the customer and to the licensee. We warn against the practice.

The licensee manufacturer, when quoting on clear Wrinkle Finishes, must stipulate that this clear Wrinkle is sold only on the price quoted for use as clear Wrinkle. Any conversion into colored Wrinkle must be reported. If the customer desires to so convert, the licensee must charge the price per gallon established for Wrinkle Finish for the color in question on the basis of the gallonage that will ultimately exist after the customer adds the color. The royalty must be paid on such ultimate gallonage. The price must be charged the customer on the basis of color added by the customer.

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NEW WRINKLE, Inc.

Licensors of Processes and Finishes

Color Classification

METALLICS

Any percentage of metallic in a formulation brings it under the classification of a "metallic."

REDS

The phrase in the minimum price schedule, "Ordinary Colors" means all colors except those containing organic reds or maroons.

The phrase in the minimum price schedule, "Organics" means "reds and maroons other than those made with oxides exclusively." *Any percentage of organics in a formulation brings it under the classification of "Organic Reds."*

Licensee's Contracts With Customers

The minimum prices established under the license contract are subject to change upon thirty days notice. Written contracts may be made under the existing price schedule and future schedules for periods not exceeding three months beginning with the time that the new price schedule goes into effect.

The minimum price schedule is for the purpose of maintaining a price, below which sales of the patented compositions referred to in the license contract cannot be made without a violation of the contract agreement. The purpose of this price list is not to indicate the prices at which a sale should be made. Prices at or above the minimum price schedule will naturally vary between manufacturers because of differences in manufacturing operations, character of ingredients, variation in the formulae, uniformity and quality of the finished product, etc. We have fixed the minimum prices as those which would insure to any manufacturer a fair minimum profit and a fair price to the public, it being understood that the public would benefit from higher prices where justified by service, quality, etc.

Licensee Sales to Manufacturing Licensed Customers

One licensee may have wrinkle finish or material thereformade for it by another licensee. The Schedule of Minimum Prices will not apply to such transaction. A licensee selling such product, however, would be responsible for the royalty and for the maintenance of the schedule of minimum prices. *Licenses will be granted* only *to manufacturers,* not *to users or jobbers*

Whenever a sale is made of concentrate by one licensee to another licensee to be "cut" or have color or metallic added to clear wrinkle by the second licensee and sold in completed condition by the second licensee ready to use, then the licensee seller and the licensee purchaser must report the details of the transaction in the month following the date on which the transaction occurs; and the licensee seller or purchaser must pay the royalty on the ready to use Wrinkle as sold to the trade by the licensee purchaser and at the prices specified on the price schedule. The report must state which one is responsible for the payment of the royalty and the royalty must be paid by the one so responsible. Under such conditions, there shall be only one royalty paid on the ultimate gallons after they are made ready for use.

The report must be quite complete to enable us to do the requisite checking.

NEW WRINKLE, Inc.

Licensees of Processes and Finishes

Terms

The prices established in the price schedule are on the basis of f. o. b. destination or freight allowance.

Discounts

The discounts are 30 days net, 1% for cash within 10 days after shipment; except that the discount period may be extended to the 20th day of the month following purchases to customers who regularly discount in the month following purchase and provided no discount shall be allowed after the discount date and further provided that each of such transactions shall be reported as to the name of the customer so that any complaint by any other licensee can be checked. This is for the protection of both the licensee and the licensor.

Licensees are authorized to grant discounts, where their manufacturing savings and sales costs justify it, not exceeding the following percentages on sales to each buyer whose total purchases under written contract of Wrinkle Finishes from the licensee granting the discounts during the *twelve months period* succeeding the date of the contract, are in excess of the quantities shown below.

½% — 2,500 gallons	3% — 15,000 gallons	7% — 35,000 gallons
¾% — 3,500 gallons	4% — 20,000 gallons	8% — 40,000 gallons
1% — 5,000 gallons	5% — 25,000 gallons	9% — 45,000 gallons
2% — 10,000 gallons	6% — 30,000 gallons	10% — 50,000 gallons and over

Licensees must state to the buyer when submitting the quotations a statement as to the discounts; and this discount can only be granted when made in writing. Such discounts shall be allowed by the licensee only upon receipt by the licensee of a written statement signed by the responsible official of the buyer that the total purchases of the license finishes during the *contract* year to date have amounted to the quantities above indicated. The discounts can only be granted on completion of the deliveries under the contract. A true copy of this letter must be furnished to New Wrinkle, Inc.

Each time a licensee allows such a discount it must attach to its next royalty report such copy of a statement received from the buyer during the preceding month, with information as to number of gallons sold to each of such buyers from the beginning of the *contract* year to the end thereof and the amount of discount so granted.

This price is based upon shipments within one year from the date of the start to the completion of the shipping on the contract of each buyer. That is, the contract must be completely shipped within one year from the date of the first shipment on the contract. This arrangement does not modify the making of prices elsewhere set forth but is based on prices as they may be established from time to time.

See "Discounts from Price Quoted on Government Contracts" (Page 6) as to discounts allowable on purchases by the United States or a Governmental Agency.

Patent Notice

The statutory notice required by the contract should be applied by the licensee, and a typical short form suggestion would be:

"Licensed under New Wrinkle, Inc. Patents."

We also approve, for the protection of the licensee and the licensor, the following long notice, where it is practical to apply it:

"Licensed under New Wrinkle patent numbers:

United States: 1,629,892 — 1,732,661 — 1,831,323 — 1,864,763 — 1,878,316 — 1,882,608 — 1,888,611 — 1,896,894 — 1,936,913 — 1,960,417 — 1,960,164 — 1,976,191 — 1,980,309 — 1,991,827 — 1,992,328 — 2,037,391 — 2,060,582 — 2,077,112 — 2,124,783 — 2,154,954 — 2,236,397 — 2,236,398 — 2,265,002 — 2,269,018 — 2,269,042 — 2,275,259 — 2,283,420 — 2,294,783 — 2,308,595 — 2,319,022 — 2,320,513 — 2,344,189 — 2,344,807 — 2,347,308 — 2,347,364 — 2,373,177 — 2,373,211 — 2,373,212 — 2,381,653 — 2,387,424 — 2,389,784 — 2,389,785 — 2,392,346 — 2,394,498 — 2,394,499 — 2,394,500 — 2,395,380 — 2,395,381 — 2,407,823. Design 88,691

Canada: 311,503 — 311,504 — 407,866 — 410,406 — 410,407 — 412,813 — 412,814 — 412,815 — 412,816 — 414,602 — 415,645. Other patents pending.

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NEW WRINKLE, Inc.

Licensors of Processes and Finishes

MINIMUM PRICE SCHEDULE No. 5

(Announced June 1, 1947)
EFFECTIVE JULY 1, 1947
(Superseding Minimum Price Schedule No. 4 as revised December 12, 1946)
Part of New Wrinkle, Inc., License Agreement
Dated April 1, 1938

The following are the minimum prices at which patented Wrinkle Finish may be sold under License Agreement, to take effect on July 1, 1947 and to remain in force until further notice.

	1 Gal.	5 Gal.	½ Drum	Drum
WRINKLE FINISH CLEAR				
—100	$2.85	$2.70	$2.65	$2.60
+100	2.70	2.55	2.50	2.45
WRINKLE FINISH BLACK				
—100	2.40	2.25	2.20	2.10
+100	2.25	2.10	2.05	2.05
WRINKLE FINISH ORDINARY COLORS				
—100	2.65	2.50	2.40	2.35
+100	2.50	2.35	2.25	2.20
WRINKLE FINISH ORGANICS				(see page 8)
—100	4.00	2.85	2.75	2.70
+100	2.85	2.70	2.60	2.55
WRINKLE FINISH METALLICS				(see page 8)
(Addition of metallic to clear Wrinkle)				
—100	2.50	2.35	2.25	2.20
+100	2.35	2.20	2.10	2.05

In the event that a metallic is added to a pigmented Wrinkle Finish, the established minimum for that pigmented finish, plus $.25, will be the minimum price.

Reductions in price for quantity as shown on above schedule are permissable on and shall apply only to quantities of wrinkle finish contained in a single shipment.

Wrinkle Finish in concentrated form or ingredients from which customer may produce wrinkle finish may be sold by Licensee only at minimum price per gallon on the number of gallons of the kind or color of wrinkle finish for final use by the customer that can normally be produced by adding to such concentrate or ingredients supplied by Licensee.

Clear Wrinkle Finish sold by Licensee under circumstances charging seller with knowledge that customer intends converting same into colored wrinkle finish may be sold only in accordance with the minimum price per gallon hereby established for wrinkle finish of the color and quantity in question.

Prices are f. o. b. destination or freight allowed.

In the event of cancellation of orders or return of goods prices shall be readjusted and settlement made according to the actual quantities purchased and retained.

Terms: 30 days net, 1% for cash within ten days after shipment.

In making bids, it is not permissable to deduct the cash discount. The cash discount of 1% can only be given or allowed if the "Wrinkle Finish" is actually paid for within ten days after shipment.

See minimum Price Schedule (No. 2-A) on Page 7 for Canadian Prices.

RULINGS JULY 1, 1938 TO JULY 1, 1947

Extended Deliveries

Quotations to Federal, State and Municipal Governments and Governmental Agencies may be based on deliveries to extend to the end of the fiscal period for which bids were invited.

Discounts from Price Quoted on Governmental Contracts

While the minimum price schedules apply on all quotations and sales to the United States, a state or municipality, or any agency thereof, the quantity discounts shown on Page 4 may be allowed on the **total gallonage** *so quoted or sold regardless of the period of such a contract or the number of gallons in individual shipments thereunder. Such discounts may be granted at the time of billing the shipments.*

Minimum Prices Applicable to Shipments Comprising More Than One Color

Where a shipment consists of more than one color, minimum prices (as given in Minimum Price Schedule No. 5 and 2-A) for the quantities of each color will apply. *It is not permissable to group several colors in one shipment and base the price on the total combined gallonage.*

Minimum Prices and Royalties Applying to Canada

Minimum Price Schedule (No. 2-A) on Page 7, covers minimum prices per Imperial gallon at which patented Wrinkle Finish may be sold in Canada. On such business the rate of royalty is Six (6c) Cents per Imperial gallon.

Metallics and Organic Reds

Particular attention is invited to "Color Classification" on Page 3 herein.

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NEW WRINKLE, Inc.

Licensors of Processes and Finishes

CANADIAN MINIMUM PRICE SCHEDULE (No. 2-A)

(Announced November 12, 1946)
EFFECTIVE DECEMBER 12, 1946
Part of New Wrinkle, Inc., License Agreement
Dated April 1, 1938

The following are the minimum prices at which patented Wrinkle Finish may be sold under License Agreement, effective October 11, 1939, and to remain in force until further notice. (Prices are based on Imperial Gallons).

Wrinkle Finish Clear

In 1 gallon cans, less then 100 gallons in single delivery	$3.44
In 5 gallon cans, less than 100 gallons in single delivery	3.25
In half-drums (approx. 30 gallons) less than 100 gallons in single delivery	3.19
In full drums (50-55 gallons), less than 100 gallons in single delivery	3.06
In 1 gallon cans, 100 or more gallons in single delivery	3.25
In 5 gallon cans, 100 or more gallons in single delivery	3.06
In half-drums, 100 or more gallons in single delivery	3.00
In full drums, 100 or more gallons in single delivery	3.07

Wrinkle Finish Colored

Wrinkle Finish in black and colors are to be sold at not less than base miminum price for clear wrinkle with following additions in price to-wit:

Blacks	add 20c per gallon
Ordinary colors and oxide reds	" 50c " "
Organic Reds (See Page 3)	" 95c " "

Wrinkle Finishes containing **metallics** *are to be sold at not less than the base minimum price for clear wrinkle, plus the above specified addition for a particular color,* **plus** *a further charge of* 35c *per gallon.*

Reductions in price for quantity as shown on above schedule are permissable on and shall apply only to quantities of wrinkle finish contained in a single shipment.

Wrinkle Finish in concentrated form or ingredients from which customer may produce wrinkle finish may be sold by Licensee only at minimum price per gallon on the number of gallons of the kind or color of Wrinkle finish for final use by the customer that can normally be produced by adding to such concentrate or ingredients supplied by Licensee.

Clear Wrinkle Finish sold by Licensee under circumstances charging seller with knowledge that customer intends converting same into colored wrinkle finish may be sold only in accordance with the minimum price per gallon hereby established for wrinkle finish of the color and quantity in question.

Prices are f. o. b. destination or freight allowed.

In the event of cancellation of orders or return of goods prices shall be readjusted and settlement made according to the actual quantities purchased and retained.

Terms: 30 days net 1% for cash within ten days after shipment.

In making bids, it is not permissable to deduct the cash discount. The cash discount of 1% can only be given or allowed if the "Wrinkle Finish" is actually paid for within ten days after shipment.

NEW WRINKLE, INC.

PATENTS

United States: 1,689,892 — 1,732,661 — 1,831,323 — 1,864,763 — 1,878,316
1,883,408 — 1,893,611 — 1,896,594 — 1,936,913 — 1,950,417
1,969,164 — 1,976,191 — 1,980,309 — 1,991,527 — 1,991,528
2,037,331 — 2,069,252 — 2,077,112 — 2,124,703 — 2,154,954
2,236,397 — 2,236,398 — 2,268,002 — 2,268,012 — 2,268,022
2,275,239 — 2,283,420 — 2,294,703 — 2,308,595 — 2,319,022
2,320,513 — 2,344,189 — 2,344,807 — 2,347,303 — 2,347,304
2,373,177 — 2,373,211 — 2,373,212 — 2,381,653 — 2,387,424
2,389,794 — 2,389,795 — 2,392,346 — 2,394,498 — 2,394,109
2,394,500 — 2,395,360 — 2,395,361 — 2,407,623

Design 88,001

Canada: 311,503 — 311,504 — 407,866 — 410,406 — 410,407 — 412,613
412,614 — 412, 615 — 412,616 — 414,932 — 415,645

Other Patents Pending

27 [File endorsement omitted]

In United States District Court

[Title omitted]

MOTION TO DISMISS—Filed October 11, 1948

Now comes the defendant, New Wrinkle, Inc., specially appearing by its counsel for the sole purpose of contesting the jurisdiction of this Court in the above entitled action, and moves this Honorable Court for an order dismissing the Complaint herein on the ground that:

In view of the averments in paragraph I (2), and the averments in paragraph III (11) first sentence of the Complaint that "New Wrinkle has not engaged in the commercial manufacture and sale of Wrinkle finishes at any time since its incorporation in 1927," it is plain that it has not engaged in interstate commerce and therefore could not be guilty of violation of Section 1 of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

I

The Anti-Trust Statute is based upon interstate commerce only:

Apex Hosiery Company v. *Leader*, 310 U.S. 469;
Atlantic Cleaners & Dyers v. *United States*, 286 U. S. 427;
Anderson v. *United States*, 171 U. S. 604.

Interstate commerce "is an intensely practical concept drawn from the normal and accepted course of business."

United States v. *Yellow Cab Co.*, 332 U.S. 218 (citing *Swift & Co.* v. *United States*, 196 U.S. 375, 398; *North American Co.* v. *S.E.C.*, 327 U. S. 686).

"The Sherman Act was enacted under authority of the commerce clause and is necessarily of no greater dignity than that clause."

Washington Brewers Institute v. *United States* (CCA 9), 137 F. (2d) 965, 967.

II

(a) Merely licensing under the Patent law is not engaging in commerce—mere legal right to enjoy the statute is a matter of law and not a matter of commerce;

"It is true that the mere making of the lease of the machines is not of itself interstate commerce."

United Shoe Mach. Co. v. *United States*, 258 U.S. 451, 465;
Ware & Lelan v. *Mobile County*, 209 U.S. 405, 411-14;
Western Live Stock v. *Bureau of Revenue*, 303 U.S. 250, 253;
Hill v. *Wallace*, 259 U.S. 44, 69;
29 *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 32-3;
Moore v. *New York Cotton Exchange*, 270 U.S. 593, 604;
Hopkins v. *United States*, 171 U.S. 578, 588-9, 602.

(b) A matter of law cannot be a matter of commerce;

"The question for the courts, however, is not economic, but wholly legal, to wit, the true interpretation of the law as enacted by Congress."

Paramount Pictures v. *United Motion Pictures T.O.* (CCA 3), 93 F. (2d) 714;
Industrial Association of San Francisco v. *United States*, 268 U.S. 64;
Levering & Garrigues Co. v. *Morrin*, 289 U.S. 103;
United Leather Workers v. *Herkert & Meisel Trunk Co.*, 265 U.S. 457;
Local 167 v. *United States*, 291 U.S. 293;
United States v. *Hutcheson*, 312 U.S. 219;
Associated Press v. *Labor Board*, 301 U.S. 103.

(c) Manufacturing and selling or entering into commercial activities may be commerce, but a patent license under the law does not constitute doing business. They may relate to things or events in other states than that of their execution but they do not contain any obligation to engage in any form of interstate commerce;

Ware & Leland v. *Mobile County*, 209 U.S. 405;
Western Live Stock v. *Bureau of Revenue*, 303 U.S. 250.

30 (d) Any dealings between The Kay & Ess Company and New Wrinkle were in the State of Ohio and were not interstate commerce.

Hopkins v. *United States*, 171 U.S. 578;
United States v. *Hutchinson*, 312 U.S. 219;
Atlantic Cleaners & Dyers v. *United States*, 286 U.S. 427.

(e) These contracts of license do not cause any movement of goods or affect the sale of goods as between the licensor and licensee. The act of making any contract which does not stipulate for the performance of an act or transaction of interstate commerce is not in

itself interstate commerce. This has been held to be true even though the contract be effected by exchange of communication across state lines;

New York Life Ins. Co. v. *Cravens*, 178 U.S. 389;
Ware & Leland v. *Mobile County*, 209 U.S. 405;
New York Life Ins. Co. v. *Deer Lodge County*, 231 U.S. 495.

"The mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce."

Jewel Tea Co. v. *Williams* (CCA 10), 118 F. (2d) 203, citing *Lipson* v. *Socony Vacuum Corporation* (CCA 1), 87 F. (2d) 265; *Moore* v. *New York Cotton Exchange*, 270 U.S. 593; *Ware & Leland* v. *Mobile County*, 209 U.S. 405; *Schechter Corp.* v. *U. S.*, 295 U. S. 495.

31 Conclusion

In view of the foregoing, it is obvious that the Plaintiff has misconceived its action and has selected the wrong defendant in New Wrinkle, Inc.

TOULMIN & TOULMIN,
By (S.) H. T. TOULMIN, JR.,
308 West 1st St.,
Dayton 2, Ohio,
Attorneys for the defendant, New Wrinkle, Inc., specially appearing for the sole purpose of contesting the jurisdiction of this Court and for no other purpose.

32 [File endorsement omitted]

In United States District Court

[Title omitted]

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM—Filed October 8, 1948

Defendant, The Kay and Ess Company, moves the Court to dismiss this action because the Complaint fails to state a claim against defendants, upon which relief can be granted in that the license of the right to manufacture and sell a patented article, where reasonable conditions limiting the price to be obtained by the licensee are incorporated in such license, does not constitute restraint of commerce forbidden by the Sherman Act, as amended,

Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, 15 USCA section 1 et seq.

(S.) HUBERT A. ESTABROOK
(ESTABROOK, FINN & McKEE)
9th floor, Mutual Home Bldg.
Dayton 2, Ohio
Attorney for Defendant,
THE KAY AND ESS COMPANY.

33 MEMORANDUM

Once having put a patented product into the channels of commerce, a patentee may not thereafter control the price which is to be obtained on resale of said product. *Ethyl Gasoline Corporation* v. *United States of America*, 309 U.S. 436, 60 S. Ct. 618, 84 Led. 852 (1940).

Where, however, the patentee does not sell his patented product, but merely grants licenses the right to manufacture and sell the product, the patentee may impose conditions restricting the terms upon which the product manufactured under such license may be used, and the price to be demanded therefor, and such conditions do not constitute a restraint on commerce forbidden by the Federal Anti-Trust Act. *E. Bement & Sons* v. *National Harrow Company*, 186 U.S. 70, 22 S. Ct. 747, 46 L. ed., 1058 (1902); *United States of America* v. *General Electric Company*, 272 U.S. 476, 47 S. Ct. 192, 71 L. ed. 362 (1926).

See also 7 A.L.R. 478, Also see 40 Am. Jur. Patents, Section 144 at page 632.

Respectfully submitted,

(S.) HUBERT A. ESTABROOK,
(ESTABROOK, FINN & McKEE)

34 In the United States District Court

[Title omitted]

ORDER

This cause now coming on for hearing on the motion of defendant, The Kay & Ess Company, for an order transferring this case from the Eastern Division of the Southern District of Ohio to the Western Division of the Southern District of Ohio, the Court, on consideration thereof, grants the same, and orders that this case and all matters pending herein, be transferred to the Western Division of the Southern District of Ohio, at Dayton, Ohio.

IT IS FURTHER ORDERED that the Clerk of this Court transmit to the Clerk of the United States District Court for the Southern

District of Ohio, Western Division, at Dayton, Ohio, for docketing on his docket all of the papers and proceedings filed herein.

(S.) UNDERWOOD,
United States District Judge.

(S.) HERBERT A. BERGSON,
(S.) LOREN G. WINDOM,
Asst. U.S. Attorney,
Attorneys for Plaintiff.

——— ———,

35 *Attorneys for Defendant,*
NEW WRINKLE, INC.

HUBERT A. ESTABROOK,
Attorneys for Defendant,
THE KAY & ESS COMPANY.

36 United States District Court, Southern District of Ohio, Western Division

Civil No. 1006

(At Dayton)

(Columbus No. 2276)

UNITED STATES OF AMERICA, *Plaintiff,*

vs.

NEW WRINKLE, INC., and THE KAY & ESS COMPANY, *Defendants*

ORDER—Filed June 5, 1951

This cause coming on to be heard on the motion to dismiss heretofore, to-wit, on October 11, 1948, filed by and on behalf of the defendant, New Wrinkle, Inc., upon the grounds and for the reasons as in said motion set forth, the Court, upon consideration whereof, together with the Complaint, the briefs of counsel and the oral arguments of counsel on February 14, 1949 (Transcript filed July 21, 1949) is of the opinion and so finds that the motion to dismiss is well taken and that it should be sustained.

IT IS THEREFORE, BY THE COURT ORDERED, ADJUDGED AND DECREED that the motion hereinabove referred to of defendant New Wrinkle, Inc., be and hereby it is, sustained, and the Complaint is dismissed, without costs to defendant, New Wrinkle, Inc.

To all of which findings, rulings, orders, judgments and decrees of the court, plaintiff excepts.

(S.) ROBERT R. NEVIN,
Chief Judge, U. S. District Court, S.D.O.

37 United States District Court, Southern District of Ohio, Western Division

Civil No. 1006

(At Dayton)

(Columbus No. 2276)

UNITED STATES OF AMERICA, *Plaintiff*

v.

NEW WRINKLE, INC., AND THE KAY & ESS COMPANY, *Defendants*

ORDER—Filed June 5, 1951

This cause coming on to be heard on the motion to dismiss heretofore, to-wit, on October 8, 1948, filed by and on behalf of defendant The Kay & Ess Company, wherein the defendant moves the court to dismiss this action upon the grounds and for the reasons as in said motion set forth, the Court, upon consideration whereof, together with the Complaint, the briefs of counsel and the oral arguments on February 14, 1949 (Transcript filed July 21, 1949) is of the opinion and so finds that the motion is well taken and should be sustained.

It is, therefore, by the court ordered, adjudged and decreed that the motion hereinabove referred to of the defendant The Kay & Ess Company, to dismiss this action as against it be, and hereby it is, sustained, and the Complaint is dismissed without costs to this defendant, The Kay & Ess Company. To all of which rulings, findings, orders, judgments and decrees of the court, plaintiff excepts.

(S.) ROBERT R. NEVIN,
Chief Judge, U. S. District Court, S.D.O.

38 [File endorsement omitted]

In the United States District Court

[Title omitted]

PETITION FOR APPEAL—Filed July 24, 1951

The United States of America, plaintiff in the above-entitled cause, considering itself aggrieved by the final judgments of the Court entered on June 5, 1951, prays that an appeal be allowed from said final judgments to the Supreme Court of the United States; that citation be issued in accordance with law, and that the material parts of the record, proceedings, and papers upon which said final judg-

ments were based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules of said Court in such cases made and provided.

(S.) NEWELL A. CLAPP,
Acting Assistant Attorney General.
(S.) ROBERT B. HUMMELL,
Special Assistant to the Attorney General.

39 [File endorsement omitted]

In the United States District Court

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 24, 1951

The United States of America having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final judgments of the Court in this cause entered on June 5, 1951, and having presented its petition for appeal, assignment of errors and prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is ordered that said appeal be and the same hereby is allowed as prayed for.

It is further ordered that citation shall issue in accordance with law.

(S.) ROBERT R. NEVIN,
United States District Judge.

40 CITATION ON APPEAL—(Omitted in printing)

41 [File endorsement omitted]

In the United States District Court

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed July 24, 1951

The United States of America, plaintiff in the above entitled cause, in connection with its appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which it will rely in its prosecution of said appeal from the final judgments of the District Court entered on June 5, 1951.

The District Court erred in:

1. Granting defendants' motions to dismiss the complaint.

2. Finding that defendants' motions to dismiss were well taken and should be sustained.

3. Entering judgments dismissing the complaint.

Wherefore, plaintiff prays that the final decrees of the District Court be reversed, and for such other relief as the Court may deem fit and proper.

(S.) NEWELL A. CLAPP,
Acting Assistant Attorney General.
(S.) ROBERT B. HUMMEL,
Special Assistant to the Attorney General.

42-43 STATEMENT REQUIRED BY PARAGRAPH 2 RULE 12 (Omitted in printing)

44 PRAECIPE FOR RECORD (omitted in printing)

45-47 AFFIDAVIT OF SERVICE OF MOTION TO DISMISS APPEAL (omitted in printing)

48 DEFENDANTS' PRAECIPE FOR RECORD (omitted in printing)

49 Clerk's Certificate to foregoing transcript omitted in printing.

50 [File endorsement omitted]

In the Supreme Court of the United States, October Term, 1951

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed August 28, 1951

a. Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

b. Appellant designates the entire record, as filed in the above-entitled case, for printing by the Clerk of this Court.

/s/ PHILIP B. PERLMAN,
Solicitor General.

51 PROOF OF SERVICE (omitted in printing)

No. 250

[Title omitted]

ORDER—October 8, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Clark took no part in the consideration or decision of this question.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 871806 319

Office-Supreme Court, U. S.
FILED
AUG 17 1951
CHARLES ELMORE CROPLEY
CLERK

No. 250

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

NEW WRINKLE, INC., AND THE KAY & FAS COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Filed July 24, 1951

Civil Action No. 1006

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

NEW WRINKLE, INC., AND THE KAY & ESS COMPANY, DEFENDANTS.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgments of the district court entered in this cause on June 5, 1951. A petition for appeal is presented to the district court herewith, to wit, on July 24, 1951.

OPINION BELOW

No opinion was filed by the District Court for the Southern District of Ohio.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgments entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgments on direct appeal in this case:

United States v. *United States Gypsum Co.*, 333 U.S. 364.

United States v. *National Assn. of Real Estate Boards*, 339 U.S. 495.

QUESTIONS PRESENTED

1. Whether an agreement by patentees for a patent licensing program to fix prices for an entire industry, with conscious participation in such program by the licensees thereunder, violates Section 1 of the Sherman Act.

2. Whether price fixing achieved through assignment of patents by two patentees to a corporation organized by them to license and fix prices is sanctioned by the patent law, and hence not within prohibitions of the Sherman Act.

3. Whether the ruling in *United States* v. *General Electric Co.*, 272 U.S. 476, authorizes a non-manufacturing patentee to fix the minimum prices at which its licensees may sell products manufactured under its patents.

STATUTE INVOLVED

The pertinent provisions of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended

(15 U.S.C. 1, 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

This is a civil action filed in September 1948 alleging a conspiracy to restrain interstate and foreign commerce in wrinkle finishes in violation of Section 1 of the Sherman Act. The complaint names two defendants—New Wrinkle, Inc., a non-manufacturing patent licensor, and The Kay & Ess Company (referred to herein as K&S), a manufacturing licensee—and a number of co-conspirators comprising the various manufacturers of wrinkle finishes licensed under the patent rights of New Wrinkle, together with Chadeloid Chemical Company (referred to herein as Chadeloid), a corporation which was dissolved in 1945. Separate motions to dismiss the complaint were filed by the defendants. The motions were argued

in February 1949, and on June 5, 1951, more than 27 months later, the district court entered orders of dismissal. No opinion was filed, but the court's orders recite that the motions to dismiss are "well taken."

The principal allegations of the complaint (admitted by the motions to dismiss) are as follows:[1]

For many years, the defendants and their co-conspirators have been engaged in a conspiracy to restrain interstate and foreign commerce in wrinkle finishes (par. 13). These finishes are enamels, varnishes and paints which produce a hard wrinkled surface when applied to metal or other material (par. 8). They have important advantages over ordinary enamels and varnishes and are widely used as surface coverings for typewriters, cash registers and many other articles (par. 9). The licensees of New Wrinkle manufacture "substantially all" of the wrinkle finishes produced in the United States, "a substantial portion" of which finishes are sold and shipped in interstate and foreign commerce (par. 12). Manufacturers of wrinkle finishes receive more than $2,000,000 annually from the sale of their products (par. 10).

Prior to and during 1937 K&S and Chadeloid were engaged in litigation over their respective patents relating to wrinkle finishes (par. 14). Chadeloid claimed that its patents were basic and that the K&S patents, which covered allegedly more efficient methods of manufacture, were subservient to its patents (*ibid.*). During 1937

[1] A copy of the complaint (not including the Exhibits attached thereto) is attached hereto as Appendix A.

the two companies negotiated with a view to effecting a pooling of their patents in order to eliminate competition between themselves and to set up a licensing system under which "prices for the entire wrinkle finish industry would be fixed" (par. 13). The negotiations resulted in a contract which they entered into on November 2, 1937 (par. 16). This contract provided: A new corporation (defendant New Wrinkle) was to be organized. K&S and Chadeloid agreed to assign their wrinkle finish patents to the new corporation in exchange for its stock. New Wrinkle was to grant patent licenses to the various manufacturers of wrinkle finishes (including K&S and Chadeloid), and was to fix "minimum prices at which all licensed manufacturers might sell" (*ibid.*). The price schedules were not to be effective until the Sherwin-Williams Company and eleven other companies (of those named as principal manufacturers of wrinkle finishes in a list attached to the contract) had signed license agreements and agreed to follow the prescribed minimum prices (*ibid.*).

Following incorporation of New Wrinkle and transfer to it of the patent rights of K&S and Chadeloid, these companies and certain of the companies named as co-conspirators worked together to induce other manufacturers to accept patent licenses from New Wrinkle in order that competitive practices which they deemed undesirable might be eliminated (par. 18). Prospective licensees were advised that other prospective licensees were being consulted "in order to establish minimum prices throughout the industry"

(*ibid.*). Meetings were held at which the terms of the licenses to be granted by New Wrinkle were agreed upon, and prices, terms, and conditions of sale were discussed (par. 19). Various manufacturers signed license agreements but price schedules were not put into effect until the Sherwin-Williams Company and eleven of the other companies listed in the agreement of November 2, 1937, had agreed to accept licenses (*ibid.*). After May 7, 1938, when the price schedules were made effective, various other manufacturers signed license agreements, and did so with knowledge that concerted action was contemplated and required in order to carry out the conspiracy to which the defendants were parties (par. 21). When the complaint was filed, more than 200 manufacturers of wrinkle finishes held patent licenses granted by New Wrinkle (par. 11).

All of New Wrinkle's patent license agreements are substantially identical (par. 21). They authorize the licensor to establish a "Schedule of Minimum Prices, Discounts, and Selling Terms," and further provide that the prescribed prices and terms shall not be binding upon the licensee unless the same terms are imposed upon all other licensees (Exhibit C,[2] par. 7).

From time to time New Wrinkle has established schedules of minimum prices and terms of sale (par. 22). The schedule in effect at the time the complaint was filed provides, among other things: A licensee violates the price schedule if he sells other products at "special cut prices" for the

[2] Exhibits C and D are attached to and made a part of the complaint (pars. 21, 22).

purpose of influencing sale of wrinkle finishes (Exhibit D, p. 2). He may sell "clear" wrinkle finish (the lowest priced product) only for use as such, and if the purchaser converts it to a colored finish, he must be charged the price fixed for colored wrinkle finish (*id.*, pp. 2, 5). The licensee may give discounts only as authorized by New Wrinkle's price schedule and only after receipt of a written supporting statement, a copy of which is to be attached to the licensee's next report to the licensor (*id.*, p. 4). The cash discount which the licensee may grant is also specified and rigidly limited (*id.*, pp. 4, 5).

Defendants intended that their conspiracy should fix identical and unreasonably high minimum prices for "substantially all wrinkle finishes manufactured and sold in the United States," and should eliminate competition between defendants and the co-conspirators in the sale of such finishes (par. 23). The conspiracy has had such effect (*ibid.*).

THE QUESTIONS ARE SUBSTANTIAL

1. The district court evidently accepted the defendants' contention that the holding in *United States* v. *General Electric Co.*, 272 U.S. 476,—that the patent law authorizes a patentee to license his patent with provisions fixing the licensee's minimum sales price—sanctions the price-fixing method here involved.[3] It is the Government's

[3] New Wrinkle also contended that mere licensing is not commerce and that New Wrinkle's licensing activities are therefore not in restraint of interstate commerce. This contention appears almost frivolous. The complaint charges fixing of the sales price of licensees and alleges that "a substantial portion" of the licensees' products are sold and shipped in interstate commerce.

contention that the allegations of the complaint bring the case squarely within the rulings of the Court in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 339 U.S. 959, 340 U.S. 76, and that the district court should therefore have denied defendants' motions to dismiss and permitted the case to go to trial.

In the *Gypsum* case the Court in its opinion on the Government's second appeal stated the grounds (340 U.S. 83-88) for its *per curiam* dismissal of the defendants' appeal from the summary judgment entered against them. The Court declared that concert of action between a patentee and those who become its licensees, to fix prices throughout an industry through the medium of patent licenses, violates the Sherman Act, and is not within the implied exception from its prohibitions of monopoly rights conferred by patent law. The Court further stated that the terms of the license agreements and other admitted facts established conscious concert in price fixing and that, since such conduct is in itself a violation of the Sherman Act, it would not be taken out of the reach of the Act by proof that there had been no agreement among the defendants to "associate themselves in a plan to blanket the industry under patent licenses and stabilize prices."

The complaint in the instant case expressly alleges agreement by the defendants upon a patent licensing program to fix prices for the entire wrinkle finish industry, and conscious participation in that program by those licensed pursuant thereto. Such allegations set forth an arrangement of the precise kind condemned in the *Gypsum* case. We

therefore submit that the district court's action in dismissing the complaint contravenes established limitations of the holding in the *General Electric* case. Upon the facts admitted by the motions to dismiss, the defendants are engaged in illegal price fixing, and the judgments of dismissal leave them free to continue this unlawful conduct.

2. This appeal also raises the question whether the combination of patents described in the complaint is illegal under the doctrine of *United States* v. *Line Material Co.*, 333 U.S. 287. The Court there held that the patent law does not sanction cross-licensing by two patent owners under an arrangement giving to one owner authority to grant price-fixing licenses under the patents of both. Clearly the Sherman Act would have been violated if K & S and Chadeloid had cross-licensed each other, with power in one to grant price-fixing licenses under the patents of both companies. The same fixing of prices was achieved through combining separately owned patents when K & S and Chadeloid organized New Wrinkle and assigned their patents to it for the purpose of granting price-fixing licenses thereunder. The Government submits that the holding in the *Line Material* case equally applies in this situation. This Court unanimously condemned as early as 1912 price limitation effected through assignment of patents to a third person to act as licensor. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20.

3. The rationale of permitting a patentee to fix the prices at which his licensee sells was stated in the *General Electric* case as follows: "When the patentee licenses another to make and vend and

retains the right to continue to make and vend on its account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods." 272 U.S. at p. 490. Since New Wrinkle, the patentee here, does not manufacture or sell the patented products, protection against price-cutting by its licensees cannot be considered as "normally and reasonably adopted to secure pecuniary reward for the patentee's monopoly" (*ibid.*).[4] The appeal therefore presents the substantial question of whether the General Electric case authorizes a *non-manufacturing* patentee to fix the prices at which its licensees sell.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

(S.) PHILIP B. PERLMAN,
Solicitor General.

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[4] Even with respect to royalty, the licensees' sales prices are immaterial. The royalty payable to New Wrinkle is the flat sum of 5¢ per gallon (Complaint, par. 20).

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

Civil Action No. 2276

Filed September 21, 1948

UNITED STATES OF AMERICA, PLAINTIFF,

v.

NEW WRINKLE, INC., AND THE KAY & ESS COMPANY, DEFENDANTS.

COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General, brings this action against the defendants and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the defendants under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the "Sherman Act," in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of said Act.

2. Each of the defendants transacts business within the Southern District of Ohio and is found therein.

II

THE DEFENDANTS AND CO-CONSPIRATORS

Defendants

3. New Wrinkle, Inc., hereinafter referred to as New Wrinkle, a corporation organized and existing under the laws of the State of Delaware, with its principal offices at Dayton, Ohio, is made a defendant herein.

4. The Kay & Ess Company, hereinafter referred to as K & S, a corporation organized and existing under the laws of Ohio, with its principal offices at Dayton, Ohio, is made a defendant herein.

Co-conspirators

5. Chadeloid Chemical Company, hereinafter referred to as Chadeloid, a corporation organized under the laws of West Virginia, is not made a defendant, but is named a co-conspirator herein. Chadeloid was dissolved in or about the year 1945 and its assets distributed among its stockholders.

6. The manufacturing concerns listed on Exhibit A attached to this complaint are not made defendants, but are named co-conspirators herein. Each is, or has been during the period covered by this complaint, a licensee under the wrinkle finish patent rights owned or controlled by New Wrinkle, Inc., and each is, or has been during that period, engaged in manufacturing and selling wrinkle finishes, as defined below.

7. Certain individuals from time to time associated with or acting on behalf of one or more of the defendants or co-conspirators have also acted as co-conspirators in the offenses charged herein.

III

Nature of the Trade and Commerce Involved

8. "Wrinkle" finishes, also known as "Crinkle," "Shrivel," "Sag," "Morocco," and by other designations, are defined as enamels, varnishes and paints which have been compounded from such materials and by such methods as to produce, when applied and dried, a hard wrinkled surface on metal or other material.

9. Wrinkle finishes are widely used as coverings for the surfaces of typewriters, cash registers, motors, adding machines, and many other articles of manufacture. They have the following advantages over smooth finishes such as ordinary enamels and varnishes:

a. One coat of wrinkle finish is sufficient for many purposes for which two or more coats of smooth finish would be required;

b. Surfaces to which wrinkle finishes are to be applied need not be prepared as carefully as those which are to receive smooth finishes, since the wrinkle finishes cover small imperfections; and

c. The original appearance of wrinkle-finished articles can be maintained with less cleaning and polishing than that of smooth-finished articles.

10. Wrinkle finishes are being produced and sold in the United States at the rate of approximately one million gallons per year and the manufacturers thereof receive in excess of two million dollars per year for these products.

11. New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1937. However, it owns or controls patents relating to wrinkle finishes, and since 1938, has licensed and now

licenses in excess of 200 manufacturing concerns to make, use, and sell wrinkle finishes under those patents.

12. Substantially all wrinkle finishes produced in the United States are manufactured by these licensees, whose places of business are located in principal cities throughout the various states. A substantial portion of the wrinkle finishes made by licensees is sold to purchasers in states other than those in which the finishes are manufactured and to purchasers in the Dominion of Canada, and is shipped from one state to another, and from various states of the United States to various locations in the Dominion of Canada in the ordinary course of business.

IV

Offenses Charged

13. For many years, the defendants and co-conspirators have been continuously and are now engaged in an unlawful combination and conspiracy, and have been continuously and are now parties to unlawful contracts, in restraint of trade and commerce in wrinkle finishes among the several states of the United States and between various states of the United States and the Dominion of Canada, all in violation of Section 1 of the Sherman Act. The defendants and co-conspirators are continuing, and threaten to and will continue said offenses unless the relief hereinafter prayed for in this complaint is granted. The aforesaid combination and conspiracy, and certain of the contracts, agreements, arrangements and understandings which formed a part and were used in effectuation thereof will be hereinafter more fully set forth and described.

14. In 1937, and for some time prior thereto, K & S and Chadeloid had been engaged in litigation with respect to various patents on wrinkle

finishes. Chadeloid held certain patents which it alleged were basic; K & S held other patents which it alleged provided for more economical and efficient means of producing wrinkle finishes, but which Chadeloid contended were subservient to the basic patents held by Chadeloid.

15. During 1937 representatives of K & S and Chadeloid negotiated with each other with a view toward effecting a pooling of the patents of the two corporations in order to eliminate competition between them and to set up a licensing system under which prices for the entire wrinkle finish industry would be fixed.

16. As a result of these negotiations, on or about November 2, 1937, K & S and Chadeloid entered into a contract providing for the formation of a new company to be known as New Wrinkle, Inc., to which K & S and Chadeloid each agreed to assign all of its patent rights relating to wrinkle finishes in return for common and preferred stock in the new corporation. The contract further provided that non-exclusive licenses under all the wrinkle finish patent rights previously held by K & S and Chadeloid would be granted by New Wrinkle to Chadeloid, K & S, and other manufacturers of wrinkle finishes, and that minimum prices at which all licensed manufacturers might sell would be fixed by New Wrinkle. Attached to the contract was a list of the principal companies then engaged in the manufacture and sale of wrinkle finishes and it was expressly agreed that the price schedules would not be made effective until the Sherwin-Williams Company, a corporation of Ohio with its general office at Cleveland, Ohio, and any eleven of the other companies on the list had signed the contract and agreed to follow the minimum prices. A copy of the list is attached to and made a part of this complaint as Exhibit B.

17. After the formation of New Wrinkle, and

the transfer to it of the patent rights previously held by K & S and Chadeloid, provided for in the aforesaid contract of November 2, 1937, the new corporation caused its stock to be issued on the following basis:

To K & S: 150 shares of preferred and 51% of the common stock.

To Chadeloid and its nominee: 400 shares of the preferred, and 49% of the common stock.

18. After the execution of the aforesaid contract, representatives of K & S and of Chadeloid worked together and with representatives of certain of the companies named as co-conspirators to induce the other companies in the industry to accept licenses from New Wrinkle in order that competitive practices deemed by them to be undesirable might be eliminated. Prospective licensees were advised that other prospective licensees had been and were being consulted in order to establish minimum prices throughout the industry.

19. Meetings were held between representatives of K & S and Chadeloid and of certain of the co-conspirators at which terms of the license agreements were agreed upon, and prices, terms, and conditions of sale were discussed. Licenses were then executed between New Wrinkle and certain of the co-conspirators; but as provided in the contract of November 2, 1937, price schedules were not put into effect until the Sherwin-Williams Company and eleven other of the specified companies listed in the contract had agree to accept such licenses. On or about May 7, 1938, the required number of manufacturing companies having signed such agreements, the price schedules were made effective.

20. The license agreements between New Wrinkle and defendant K & S and between New Wrinkle

and the other licensed manufacturers of wrinkle finish provide, among other things, that:

a. Each licensee is licensed under New Wrinkle patents to make, use and sell wrinkle finishes;

b. Each licensee, in its sales of wrinkle finishes, is required to sell such finishes at not less than the minimum prices and discounts and on selling terms no more favorable than those established and to be established by New Wrinkle, except when selling to other licensees;

c. Each licensee agrees to pay a royalty of five cents per gallon on wrinkle finishes which it sells or uses;

d. Prices, terms and conditions of sale may be changed by New Wrinkle on 30 days' notice to each licensee and each licensee may cancel the agreement by giving written notice at any time during this 30-day period.

21. From time to time after May 7, 1938, knowing that concerted action among the defendants and co-conspirators was contemplated and required in order to carry out and maintain the aforesaid illegal combination and conspiracy and the aforesaid illegal contracts, other companies accepted licenses containing provisions similar to those described in paragraph 20 above. All of the license agreements are substantially identical. A copy of one of such agreements is attached to and made a part of this complaint as Exhibit C.

22. New Wrinkle, with the advice and consent of its licensees, from time to time has issued to all of such licensees schedules of minimum prices, terms and conditions of sale to be followed by each licensee in its sales of wrinkle finishes. Each licensee thereafter adhered to the minimum prices, terms and conditions of sale set forth in those schedules. A copy of the schedule in effect at the

present time is attached to and made a part of this complaint as Exhibit D.

V

EFFECT OF THE COMBINATION AND CONSPIRACY AND THE CONTRACTS

23. The combination and conspiracy and the contracts, and the acts done in effectuation thereof, hereinabove described, have had the effect, as intended by the defendants and co-conspirators, of fixing and maintaining identical and unreasonably high and arbitrary minimum prices, discounts and selling conditions and terms for substantially all wrinkle finishes manufactured and sold in the United States, and of eliminating competition between the defendants and co-conspirators in the sale of such finishes.

RELIEF

WHEREFORE, plaintiff demands:

(1) That the aforesaid combination and conspiracy and contracts be adjudged and decreed to be unlawful and in violation of Section 1 of the Sherman Act.

(2) That the aforesaid contracts and license agreements between the defendants and between the defendants, or either of them, and one or more of the co-conspirators, be declared to be illegal and be ordered terminated and cancelled.

(3) That the defendants and their officers, directors, agents, representatives, successors, assigns, and all persons and corporations acting on behalf of them or either of them be perpetually enjoined from combining, conspiring or agreeing to restrain trade and commerce in wrinkle finishes among the several states of the United States and with foreign nations, and that they be perpetually enjoined from engaging in or participating in practices contracts, relationships or understand-

ings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing any of the aforesaid violations of the Sherman Act.

(4) That the Court adjudge and decree that the defendants have used their patent rights unlawfully in instituting, effectuating, and maintaining the aforesaid combination and conspiracy and the aforesaid unlawful contracts, and enter such orders relating to any and all of their patent rights as the Court may deem appropriate and necessary to dissipate the effects of the unlawful combination and conspiracy, contracts and activities herein alleged, and to establish free and unfettered competition in the trade and commerce herein described.

(5) That the plaintiff have such further, general and different relief as the nature of the case may require and the Court may deem proper in the premises.

(S.) ROBERT A. NITSCHKE,
Special Assistant to the Attorney General.

JOHN S. JAMES,
FRANK W. GAINES, JR.,
Special Attorneys.

(S.) TOM C. CLARK,
Attorney General.

(S.) HERBERT A. BERGSON,
Assistant Attorney General.

(S.) GEORGE L. DERR,
Special Attorney.

(S.) RAY J. O'DONNELL,
United States Attorney.

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No. 250

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AUG 21 1951
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA, APPELLANT

v.

NEW WRINKLE, INC. and THE KAY & ESS COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OF APPELLEE NEW WRINKLE, INC.

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 250

UNITED STATES OF AMERICA, APPELLANT

v.

NEW WRINKLE, INC. and THE KAY & ESS COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OF APPELLEE NEW WRINKLE, INC.

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1. This antitrust suit was brought against two defendants, New Wrinkle, Inc. and The Kay & Ess Company. The complaint alleged that they had conspired to restrain interstate commerce by using patent licenses to fix prices for goods sold in interstate commerce. Defendant New Wrinkle moved to dismiss on the ground, which it characterized as jurisdictional, that since it is not engaged in interstate commerce, it could not be guilty of violating the Sherman Act. Defendant Kay &

Ess moved to dismiss on the ground that the complaint failed to state a case upon which relief could be granted, in that reasonable price conditions attached to a patent license did not violate the Sherman Act. The District Court in two identical orders, one for each defendant, finding that "the motion is well taken," granted the motions, and dismissed the complaint without filing any opinion.

In view of the failure of the District Court to set forth any specific reasons for its action, the Government's Assignment of Errors followed the language of the two orders of dismissal and merely assigned as error the granting of the motion to dismiss and the "finding that defendants' motions to dismiss were well taken." In the Questions Presented in its Statement as to Jurisdiction the Government set forth three questions with respect to the rights of a patentee to fix prices [all of which related to the point raised by Kay & Ess], but did not mention the commerce question raised by New Wrinkle. The commerce point was discussed summarily, however, in footnote 3, as follows:

> New Wrinkle also contended that mere licensing is not commerce and that New Wrinkle's licensing activities are therefore not in restraint of interstate commerce. This contention appears almost frivolous. The complaint charges fixing of the sales price of licensees and alleges that "a substantial portion" of the licensees' products are sold and shipped in interstate commerce.

2. Motions to dismiss the Government's appeal have been filed by appellees. Since the motion filed by Kay & Ess goes to the merits of patent questions which have been adequately treated in the Statement as to Jurisdiction, it is unnecessary to deal with that motion here.

Appellee New Wrinkle argues in support of its motion to dismiss that the appeal of the United States is defective because of an alleged failure to appeal from the "jurisdictional" basis of the district court's dismissal of the complaint. This contention, although now characterized as jurisdictional, is in effect another way of saying that the complaint does not state a cause of action against this appellee because it fails sufficiently to show the interstate commerce involved.

The Assignment of Errors was sufficient to raise the question presented by New Wrinkle's motion to dismiss. In view of the absence of any specific statement of the grounds for the decision below the Government could only assign error in the same general terms as are contained in the District Court's order of dismissal. To the extent that the order may have been based on New Wrinkle's commerce contention, that ruling was properly challenged by the general assignments including the assignment of error to the "finding that the motion was well taken."

The reason for the failure of the Government to include the commerce question among the questions presented in the Statement as to Jurisdiction

was the belief that this contention, at variance with this Court's long settled interpretation of the Sherman Act,[1] was too frivolous to warrant more extensive treatment than the footnote reference in note 3 of the jurisdictional statement. (Quoted at p. 2, *supra*.) This reference to the commerce question was sufficient to indicate that the point was in the case, and that to the extent that the court below may have agreed with New Wrinkle's contention, the Government regarded its reasoning as erroneous. In any event, the statement of questions presented is not required in a Statement as to Jurisdiction (as it is in a petition for certiorari), and is merely included for the convenience of the Court to indicate what appellant considers to be the major issues for consideration. See Stern and Gressman, *Supreme Court Practice*, p. 223. Plainly, it does not supersede or waive the Assignment of Errors.

3. In order to demonstrate the complete lack of substance to New Wrinkle's argument that a restraint of interstate commerce was not properly alleged, and to show why the contention was not further dignified in the jurisdictional statement, it is sufficient to quote several passages from the complaint:

---

[1] If a conspiracy is directed toward restraining interstate commerce or if it results in a restraint upon interstate commerce, it is immaterial whether the conspirators themselves are engaged in interstate commerce. *Loewe* v. *Lawlor*, 208 U.S. 274, 301; cf. *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 233-234.

11. New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1937. However, it owns or controls patents relating to wrinkle finishes, and since 1938, has licensed and now licenses in excess of 200 manufacturing concerns to make, use, and sell wrinkle finishes under those patents.

12. Substantially all wrinkle finishes produced in the United States are manufactured by these licensees, whose places of business are located in principal cities throughout the various states. A substantial portion of the wrinkle finishes made by licensees is sold to purchasers in states other than those in which the finishes are manufactured and to purchasers in the Dominion of Canada, and is shipped from one state to another, and from various states of the United States to various locations in the Dominion of Canada in the ordinary course of business.

[Then follows a description of the offenses charged.]

* * * * *

23. The combination and conspiracy and the contracts, and the acts done in effectuation thereof, hereinabove described, have had the effect, as intended by the defendants and co-conspirators, of fixing and maintaining identical and unreasonably high and arbitrary minimum prices, discounts and selling conditions and terms for substantially all wrinkle finishes manufactured and sold in the United States, and of eliminating competition between

the defendants and co-conspirators in the sale of such finishes.

These allegations, of course, are admitted for purposes of dealing with the motions to dismiss.

The Government is not seeking a "premature" decision of "moot" questions, as appellee contends, but a resolution of the question upon which the court below has ruled—i.e., whether the complaint states a cause of action. In view of the generality of the court's ruling, the Government was not required to be more specific in its assignments.

CONCLUSION

For the foregoing reasons the motion to dismiss the appeal should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

AUGUST 1951.

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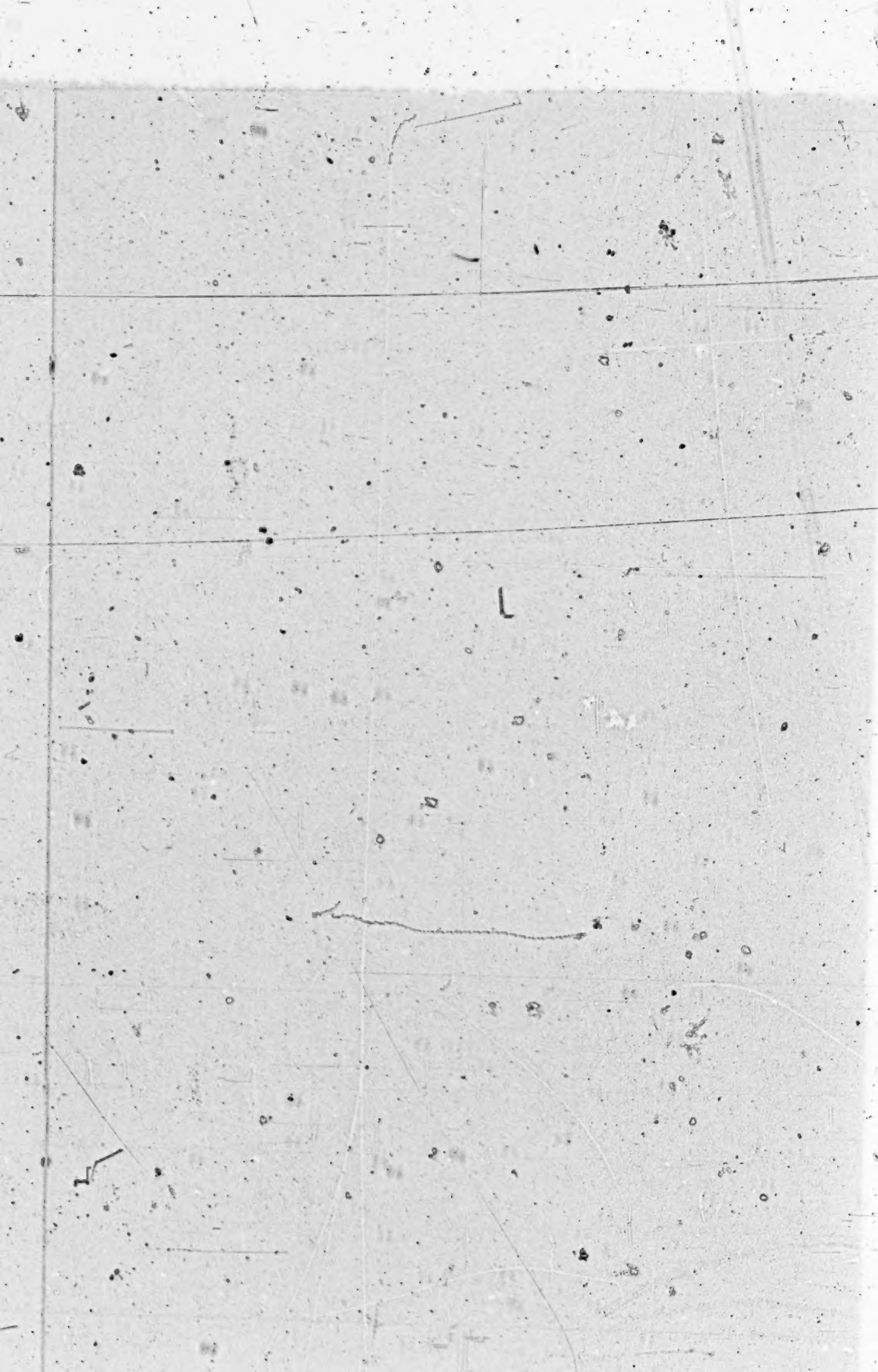

Supreme Court, U.S.
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No. 250

In the Supreme Court of the United States

OCTOBER TERM, 1954

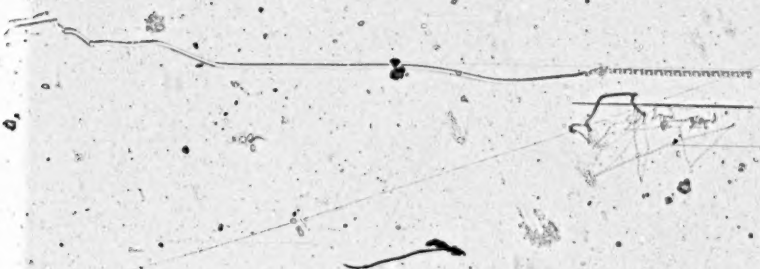
UNITED STATES, APPELLANT

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES



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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 250

UNITED STATES, APPELLANT

v.

NEW WRINKLE, INC., AND THE KAY & ESS COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not render an opinion.

JURISDICTION

The judgments dismissing the complaint were entered on June 5, 1951 (R. 27–28). The petition for appeal was filed and allowed on July 24, 1951 (R. 28–29). The jurisdiction of this Court is invoked under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. On October 8, 1951, this Court noted probable jurisdiction of the appeal (R. 31).

QUESTIONS PRESENTED

1. Whether the allegations of the complaint that appellees conspired to fix uniform minimum prices and to eliminate competition throughout the wrinkle finish industry, by means of patent license agreements, charge a violation of Section 1 of the Sherman Act.

2. Whether a patentee who does not make or sell a patented product goes beyond his patent monopoly, and hence stands in violation of the Sherman Act, when he enters into substantially identical patent licenses fixing uniform minimum prices for some 200 licensees.

3. Whether two patentees act outside their patent monopoly and violate the Sherman Act when they unite their patents for the purpose of fixing prices, by creating a corporation to take over their patents and to grant price-fixing licenses thereunder.

4. Whether the prohibitions of Section 1 of the Sherman Act apply to a corporation which is a party to a conspiracy to restrain interstate commerce but does not itself engage in the commerce subjected to restraint.

STATUTE INVOLVED

Section 1 of the Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended by the Act of August 17, 1937, 50 Stat. 693, provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. [15 U. S. C. 1.]

STATEMENT

This is a civil proceeding brought by the United States under Section 4 of the Sherman Act charging the defendants, New Wrinkle, Inc., and The Kay & Ess Company, with violating Section 1 of the Act. Shortly after the filing of the complaint in September 1948 (R. 1), the defendants (referred to herein as New Wrinkle and K&S) filed motions to dismiss (R. 23-26). The K&S motion asked for dismissal upon the ground that the complaint failed to state a cause of action. The ground of the New Wrinkle motion was that, since the complaint averred that New Wrinkle has at no time "engaged in the commercial manufacture and sale of wrinkle finishes", it has not engaged in interstate commerce and therefore "could not be" guilty of violating the Sherman Act. On June 5, 1951, the district court, without rendering an opinion, entered judgments dismissing the complaint, and recited in each judgment that the defendant's motion to dismiss is "well taken" (R. 27, 28). The Government appealed from these final judgments of dismissal.

The complaint alleges, and the motions to dismiss admit, the following:

For many years the defendants and those named in the complaint as co-conspirators have been engaged in a conspiracy in restraint of interstate and foreign commerce in wrinkle finishes, in violation of Section 1 of the Sherman Act (par. 13,[1] R. 3). The conspiracy has had the effect, "as intended by the defendants and co-conspirators," of fixing identical and unreasonably high minimum prices, discounts, and selling terms and conditions "for substantially all wrinkle finishes manufactured and sold in the United States," and of eliminating competition between the defendants and their co-conspirators in the sale of such finishes (par. 23, R. 5).

Wrinkle finishes are enamels, varnishes and paints which produce a hard wrinkled surface when applied to metal or other material. They have important advantages over ordinary enamels and varnishes and are widely used as surface coverings for typewriters, cash registers and many other articles. Approximately 1,000,000 gallons are sold per year and manufacturers receive from the sale of these products over $2,000,000 annually. The licensees of New Wrinkle manufacture "substantially all" of the wrinkle finishes produced in the United States, and a

[1] Our paragraph references are to paragraphs of the Government's complaint.

substantial portion of the wrinkle finishes which they make is sold and shipped to purchasers in states other than the state of manufacture, and to purchasers in Canada. (Pars. 8–10, 12; R. 2–3.)

The co-conspirators named in the complaint are the Chadeloid Chemical Company (referred to herein as Chadeloid), a corporation which was dissolved in 1945; the manufacturers of wrinkle finishes listed in Exhibit A attached to the complaint (see R. 7–11), each of which had been during the period of the conspiracy a licensee under the wrinkle finish patent rights owned or controlled by New Wrinkle; and individuals who had acted on behalf of the defendants or the foregoing co-conspirators in carrying out the conspiracy charged in the complaint (pars. 5–7, R. 1–2).

The conspiracy had its inception in 1937. In that year and for some time earlier, K&S and Chadeloid had been engaged in litigation with respect to various patents on wrinkle finishes. Chadeloid held certain patents which it claimed were basic and K&S held other patents which it alleged provided for more economical and efficient methods of manufacture, but which Chadeloid contended were subservient to its patents. During 1937 the two companies negotiated with a view to effecting a pooling of their patents in order to eliminate competition between themselves and to set up a "licensing system" under which "prices

for the entire wrinkle finish industry would be fixed." (Pars. 14–15, R. 3.)

As a result of these negotiations, K&S and Chadeloid entered into a contract on or about November 2, 1937. The contract provided that a new corporation (defendant New Wrinkle) would be formed; that K&S and Chadeloid would each assign to New Wrinkle all of its patent rights relating to wrinkle finishes in exchange for common and preferred stock of New Wrinkle; that New Wrinkle would grant to K&S, Chadeloid and other manufacturers of wrinkle finishes non-exclusive licenses under the patents previously held by K&S and Chadeloid; and that New Wrinkle would fix minimum prices at which all licensed manufacturers might sell. A list of the principal manufacturers of wrinkle finishes was attached to the contract,[2] and it was expressly agreed that the price schedules to be prescribed by New Wrinkle would not be made effective until the Sherwin-Williams Company and eleven others of the listed manufacturers had agreed to follow the prescribed minimum prices. (Par. 16, R. 3–4.)

Following incorporation of New Wrinkle and transfer to it of the patent rights of K&S and Chadeloid relating to wrinkle finishes, New Wrinkle issued 51% of its common stock and 150 shares of preferred to K&S and 49% of its common stock and 400 shares of preferred to

[2] This list was attached to and made a part of the complaint as Exhibit B (R. 4, 11).

Chadeloid. Thereupon these companies and certain of the companies named as co-conspirators worked together to induce "the other companies in the industry" to accept patent licenses from New Wrinkle in order that competitive practices which they deemed undesirable might be eliminated. Prospective licensees were advised that other prospective licensees were being consulted "in order to establish minimum prices throughout the industry." (Pars. 17–18, R. 4.)

Representatives of K&S, Chadeloid and certain of the co-conspirators held meetings at which the terms of the licenses to be granted by New Wrinkle were agreed upon, and prices, terms, and conditions of sale were discussed. Certain licenses between New Wrinkle and manufacturers of wrinkle finishes were executed, but, as provided in the contract of November 2, 1937, price schedules were not put into effect until the Sherwin-Williams Company and eleven of the other companies listed in that contract had agreed to accept licenses. By May 7, 1938, the required number of manufacturers had signed license agreements, and the price schedules were made effective. (Par. 19, R. 4.)

From time to time after May 7, 1938, other companies, knowing that concerted action was contemplated and required in order to carry out defendants' conspiracy, entered into substantially identical license agreements with New Wrinkle

(par. 21, R. 5).[3] At the time the complaint was filed more than 200 manufacturers of wrinkle-finishes held such licenses (par. 11, R. 2). The license agreements provide, among other things, that the licensor (New Wrinkle) may establish a schedule of minimum prices, discounts and selling terms, which the licensor, the licensee, and "all other" licensees shall thereafter observe in all sales of products covered by the licensed patents; that the licensor, upon giving 30 days advance notice in writing to the licensee, may establish new minimum prices, discounts and selling terms; and that the minimum prices, discounts or selling terms prescribed by New Wrinkle shall be binding upon the licensee only if they are imposed "at the same time and in the same terms" upon the licensor and "all other" licensees (R. 13).

The license agreements run for ten years, but may be extended for "further periods" upon written notice from the licensee to the licensor given two months before the expiration date (R. 12). The licensee has the right to terminate the license at any time upon three months written notice to the licensor, and the licensor may terminate the license if the licensee violates any of its provisions and fails to remedy the violation within 30 days after written notice thereof from the licensor (*ibid.*). The royalty payable by the licensee is 5¢ per gallon of wrinkle finish sold

[3] A copy of one of these licenses is attached to the complaint as Exhibit C (R. 5, 12–13).

or used by it, but if any subsequent license is granted with lower terms of royalty, such lower terms shall apply to the licensee (R. 12, 13).

New Wrinkle, with the advice and consent of its licensees, has from time to time issued schedules of minimum prices, terms and conditions of sale to be observed by its licensees, and each licensee has adhered to the minimum prices, terms and conditions of sale set forth in these schedules (par. 22, R. 5). A copy of the schedule in effect when the Government's suit was instituted is attached to and made a part of the complaint as Exhibit D (R. 5, 15–22).

The existing schedule contains numerous provisions adapted to securing rigid uniformity in the prices and terms at which members of the wrinkle-finish industry sell their product. Granting any unauthorized discount or rebate, placing stocks on consignment, or sale of other products at "special cut prices" for the purpose of influencing the sale of wrinkle finishes constitutes a violation of the price schedule and renders the license "subject to cancellation" (R. 16).[4] Prices must be "f. o. b. destination or freight allowed" (R. 19). Terms of sale must be 30 days net, with 1% discount for payment within ten days, but this discount cannot be deducted in making bids

[4] New Wrinkle undertakes to investigate promptly any violation, and requests licensees to make prompt reports of violations and to make these reports "full and complete" (R. 16).

and is allowable only if payment is actually made within ten days after shipment (*ibid.*). Maximum quantity discounts are specified, and can be granted only on purchases under written contract (R. 18). They must be based on purchases during the 12-months period following date of contract, and the licensee must have stated the discounts to the buyer when submitting his quotation (*ibid.*). The discounts can be granted only on completion of deliveries under the contract and only if the licensee has received a statement signed by the responsible official of the buyer setting forth the quantities purchased during the contract period (*ibid.*).[5]

The products to which the prescribed minimum prices apply are specified in minute detail. The schedule recites that "the intent and purpose of the price schedule and license contract is to insure that all licensees sell at not less than the minimum price established", and that prices have been established upon the basis of sale of wrinkle finishes "in their ready to use condition" (R. 16). What constitutes "ready to use" is then minutely specified as follows (*ibid.*):

> It is, therefore, established by the Licensor that 67.5% of solids by weight is fixed as the maximum solid content of all en-

[5] The schedule also provides that each time a licensee allows a quantity discount it must attach to its next royalty report a copy of the statement received from the buyer, together with information as to the number of gallons sold to him during the contract year (R. 18).

amels ready for use except those enamels containing organic reds and maroons; and 55% of solids by weight is fixed for all enamels containing organic reds and maroons.

Supplier shall make the following determination at 60° F.: if Wrinkle Finish requires more than 10% reduction at this temperature for normal spray gun application it shall be regarded as a "concentrated material" and not "a ready for use" material and the minimum price of such "concentrated material" shall be One ($1.00) Dollar per gallon more than the established schedule of prices.

The schedule establishes minimum prices for five classifications of wrinkle finishes (R. 19). One of the classifications, "Wrinkle Finish Organics," is defined as meaning "red and maroons other than those made with oxides exclusively," to which is added: "*Any* percentage of organics in a formulation brings it under the classification" (R. 17). As to the classification "Wrinkle Finish Clear," the lowest priced product, it is provided that if it is sold under circumstances charging the licensee with knowledge that the customer intends to convert it into colored wrinkle finish, it must be sold at the minimum price prescribed for wrinkle finish "of the color and quantity in question" (R. 19). And wrinkle finish may be sold in concentrated form "only at minimum price per gallon on the number of

gallons of the kind or color of wrinkle finish" which the customer can normally produce by adding to the concentrate (*ibid.*).

The allegations with respect to interstate commerce are summarized in Point IV, *infra*, pp. 38–39.

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

1. In granting defendants' motions to dismiss the complaint.

2. In finding that defendants' motions to dismiss were well taken and should be sustained.

3. In entering judgments dismissing the complaint.

SUMMARY OF ARGUMENT

I

This case falls squarely within the established rule that a patentee who conspires with others to fix and stabilize prices and to eliminate price competition on an industry-wide basis through the medium of patent licensing agreements violates the Sherman Act and is not within any immunity therefrom given by patent law. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 340 U. S. 76. In this case there is no problem of drawing the line between such illegal conspiracy and exercise by a patentee of monopoly rights of his patent as given recognition

in *United States* v. *General Electric Co.*, 272 U. S. 476, namely, granting a patent license with price restrictions provided such restrictions are normally and reasonably adapted to secure pecuniary reward for the exclusive right of manufacture, use and sale vested in the patentee by patent law. Here price fixing and trade-restraining agreements incident thereto were the core, the objective, and the effect of appellees' conspiracy. Indeed, establishment of price uniformity was explicitly incorporated in the patent licensing agreements, and in this respect the price-fixing character of the conspiracy was more open and avowed than in *Gypsum*. In addition, the conspiracy involved, as in *Gypsum*, maintenance of rigid and meticulous control over prices and terms of sale.

II

The fact that in this case price limitation is incorporated in license agreements made by a patentee who did not make or sell the patented product makes the doctrine of the *General Electric* case inapplicable. Price limitation was there sanctioned only to the extent that it is a normal and reasonable means of securing to the patentee royalty income from licensees without impairing his ability to secure the profit obtainable from selling the patented product himself at such prices as he chooses to charge. But when a patentee who merely grants licenses to others provides for establishing a uniform price for all

licensees, the patentee then purveys, in addition to patent production, a purported right to sell the product at controlled and fixed prices. Patents confer upon their holders no privilege to secure as a reward for the limited monopoly of the patent the value which attaches to sale of a product free from price competition. *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 400; *United States* v. *Masonite Corp.*, 316 U. S. 265, 281, 282; *United States* v. *Vehicular Parking, Ltd.*, 54 F. Supp. 828, 838 (D. Del.).

III

United States v. *Line Material Co.*, 333 U. S. 287, held that patent law does not permit two patent owners to combine the monopolies of their individual patents for the purpose of fixing prices on products embodying their respective patents. In *Line Material* separately owned patents were pooled for this purpose by cross-licensing. In the present case such pooling of separately owned patents was effected by assigning the patents to a corporation created and controlled by the patentees. We submit that the principles of decision in the *Line Material* case are equally applicable in this situation. Moreover, here, but not in *Line Material*, the agreement under which the patentees combined their patents expressly provided for price fixing under the combined patents.

IV.

What is condemned by Section 1 of the Sherman Act is conspiring to restrain interstate commerce. Participation in such a conspiracy is therefore a violation of the section irrespective of whether the conspiring party is engaged in the interstate trade subjected to restraint or in any interstate trade. Countless decisions of this Court have so applied the Act and in the recent case of *United States* v. *Women's Sportswear Association*, 336 U. S. 460, 464, the Court expressly ruled upon this point. There is therefore no merit in New Wrinkle's contention that, because it was not engaged in interstate commerce, it was not subject to the prohibitions of the Act.

On the facts now standing admitted, it is beyond question that New Wrinkle was party to a conspiracy to fix prices on goods sold and shipped in interstate commerce. There is also no doubt that the Government's appeal challenged both dismissal of the indictment as to New Wrinkle and the legal ruling or rulings made by the district court when it found, as it cryptically stated, that New Wrinkle's motion to dismiss was "well taken." The Government in its appeal assigned such ruling or rulings as error.

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ARGUMENT

I

APPELLEES' CONSPIRACY TO FIX UNIFORM MINIMUM PRICES AND ELIMINATE PRICE COMPETITION THROUGHOUT AN ENTIRE INDUSTRY, THROUGH THE MEDIUM OF PATENT LICENSING AGREEMENTS, VIOLATES SECTION 1 OF THE SHERMAN ACT

The general principles governing the relationship between rights given by patent law and conduct forbidden by the Sherman Act are well settled. The exclusive privileges conferred by the patent grant are not deemed to involve restraint or monopolization of trade of a kind prohibited by the Sherman Act. *United States* v. *Line Material Co.*, 333 U. S. 287, 309, 310. But when the acts of a patentee are not confined to exercise of the exclusory rights vested in him by the patent grant, his conduct is governed by all prohibitions of general law, including those of the Sherman Act. Patent law gives the patentee no general right to combine with others to fix prices or otherwise to eliminate competition, and any combination of this kind, unless within the four corners of the patent grant, violates the Sherman Act. *United States* v. *Masonite Corp.*, 316 U. S. 265, 277; *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 400, 401.

This Court has held that when a patentee himself makes and sells a product covered by his patent and licenses another to make and sell,

with the requirement that he sell at not less than the price at which the patentee sells, this restriction on the licensee's sales price comes within the implied terms of the patent grant. *United States* v. *General Electric Co.*, 272 U. S. 476.[6] The ground of decision was that this limitation is "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly," in that it enables the patentee to obtain as a reward the return coming from multiple exploitation of the exclusive rights conferred by his patent, without impairing his opportunity to obtain the reward which comes from selling the patented product himself at whatever price he thinks will bring the greatest return. 272 U. S. 476, 489–490.

But a patentee who combines or conspires with others to restrain or monopolize trade contrary to the general commands of the Sherman Act gains no immunity therefrom by reason of the fact that the objectives of the conspiracy are to be achieved through the medium of patent licensing agreements couched in terms of an exercise of patent privilege. This was the unanimous holding of

[6] In *United States* v. *Line Material Co.*, 333 U. S. 287, the district court had rested its decision on the *General Electric* case and this Court was equally divided on the question of overruling that case. A majority of the Court held, however, that the *General Electric* doctrine did not permit two patent owners, pursuant to cross licenses, to combine "to fix prices on articles covered by the respective patents" (333 U. S. at p. 312).

this Court both before and after the *General Electric* decision. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20; *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364; *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76.

The defendants in the *Gypsum* case had entered into patent licensing agreements providing for fixing uniform minimum sales prices, and the agreements had been made with knowledge that such price fixing was an objective of the agreements. In the first appeal the Court held that a showing that all former competitors in an industry had acted in concert to organize the industry and stabilize prices through the medium of patent licenses was sufficient to establish a violation of the Sherman Act. 333 U. S., at p. 401. The Court also held that when competition was thus suppressed, the returns thereby obtained by the patentee were not the reasonable and normal rewards of his patent monopoly contemplated and protected by patent law (*ibid*).

On the second appeal the Court, in reaffirming its prior basic rulings, held that "price-fixing licenses made in knowing concert by standardized price requirements violated the Sherman Act by their very existence." 340 U. S. 76, 86. The Court further held that, since these facts establish violation of the statute, their force is not overcome by proof that the license agreements had been made individually, and to achieve legitimate patent ends (*id.*, pp. 86–87).

Where the issue of Sherman Act violation comes before the Court after trial, there may at times be difficulty in determining whether the making of a series of patent license agreements with minimum price restrictions constitutes a conspiracy in restraint of trade which transcends mere exercise of the patentee's patent privilege. Cf. *United States* v. *Line Material Co.*, 333 U. S. 287. The present case, however, presents no problem of drawing the line between licit and illicit conduct. On the facts standing admitted, appellees' violation of the Sherman Act is clear. They are parties to a conspiracy having as its purpose the fixing of identical minimum prices and terms of sale on substantially all wrinkle finishes sold in the United States and the elimination of competition in the sale of such finishes (pars. 12, 13, 23; R. 3, 5). It was a part of the conspiracy that two patentees would pool their patents "in order to * * * set up a licensing system under which prices for the entire wrinkle finish industry would be fixed" (par. 15, R. 3). It was further a part of the conspiracy that a new corporation (appellee New Wrinkle) would be formed, that the wrinkle finish patents would be assigned to it, that it would grant licenses under these patents to the various manufacturers of wrinkle finishes, and that "minimum prices at which all licensed manufacturers might sell would be fixed by New Wrinkle" (par. 16, R. 3-4).

Price fixing is the core of the conspiracy alleged in the complaint. Indeed, charges of such a conspiracy could hardly be framed more sharply and starkly. The conspiracy, moreover, had the very elements which, in the *Gypsum* decisions, were held to be determinative of illegality. And if the facts to which we have referred were deemed not in themselves conclusive, the additional facts set forth in the complaint and presently admitted would require the conclusion that there was unlawful combination to establish and maintain industry-wide price control, not the narrowly limited type of price-fixing agreement permissible under patent law. We briefly review further admitted facts pertinent to the question of the legality of appellees' conspiracy.

The price fixing which the conspiracy was designed to bring about was not to be set in motion until 12 of the 18 "principal" producers of wrinkle finishes had signed license agreements and agreed to follow the minimum prices prescribed by New Wrinkle (par. 16, R. 4; Ex. B, R. 11).[7] This aspect of the conspiracy was carried out, and price fixing was not put into effect until 12 of the designated leaders of the industry had signed license agreements authorizing New Wrinkle to establish minimum prices and terms of sale for wrinkle finishes (pars. 19–20, R. 4–5). Prospective licensees were advised that they and

[7] One of the 12 had to be the Sherwin Williams Company (par. 16, R. 4).

others were being approached "in order to establish minimum prices throughout the industry" (par. 18, R. 4).

Approximately 200 manufacturers, representing substantially the entire domestic production of wrinkle finishes, have entered into license agreements with New Wrinkle (pars. 11–12, R. 2–3). These agreements, all of which are substantially identical, provide that New Wrinkle may prescribe minimum prices, discounts and selling terms for products covered by the licensed patents (pars. 20–21, R. 5). New Wrinkle, with the consent and advice of its licensees, has in fact prescribed such minimum prices and terms, and each licensee has adhered thereto (par. 22, R. 5). The conspiracy has resulted in the fixing and maintenance of identical and unreasonably high minimum prices, discounts, and selling terms and conditions, and in the elimination of competition, for substantially all wrinkle finishes sold in the United States (par. 23, R. 5).

The license agreements provide, specifically and somewhat redundantly, that the minimum prices and terms of sale established by New Wrinkle shall be identical for all licensees. The agreement reserves to New Wrinkle the "right" to establish such prices and terms, but only if they are also applicable to "all other Licensees" and to

New Wrinkle itself[8] (Exhibit C, R. 13). The agreement further provides (*ibid.*):

> No Schedule of Minimum Prices, Discounts and Selling Terms nor any modification or amendment or suspension thereof shall be binding upon Licensee unless at the same time and in the same terms imposed upon Licensor and all other Licensees.

While there is no doubt that the defendants in *Gypsum* had agreed and conspired to establish uniform minimum prices, the license agreements themselves did not, as here, explicitly provide for uniform minimum prices.[9] Accordingly, in the case now before the Court agreement on price uniformity is more firmly and blatantly incorporated into the license agreements than in the agreements involved in the *Gypsum* decisions. Furthermore, the Gypsum agreements permitted immediate and unheralded price changes, since a licensee was required to observe a new minimum

[8] New Wrinkle has never undertaken to make or sell wrinkle finishes (par. 11, R. 2), but if it had done so the minimum prices and terms which it had prescribed for licensees would have been binding on it.

[9] United States Gypsum Company's license agreements provided merely that the licensor may fix the licensee's minimum sales price, and that said minimum price "shall not be more than that price at which Licensor determines to sell" (333 U. S. at pp. 405–407). The licensor therefore could, without departing from the provisions of the license agreements, fix lower minimum prices for a particular licensee than those fixed for other licensees (and lower than its own sales price).

price after receipt of "written or telegraphic notice" of the change (see 333 U. S., at pp. 406–407). The provision in the New Wrinkle license agreements that no price change can go into effect until after 30 days' notice in writing to the licensee (Exhibit C, R. 13) tends to promote advance understanding and agreement upon price changes.

In the present case, just as in *Gypsum*, rigid and meticulous control over prices and terms of sale has been maintained. New Wrinkle's current edition of "License Rulings" (par. 22, R. 5, Ex. D., R. 15) states (R. 16):

> The minimum price schedule and the contract carefully specify that the intent and purpose of the price schedule and license contract is to insure that all licensees sell at not less than the minimum price established * * *.

Sales f. o. b. mill, placing stocks on consignment, and sale of other products at "special cut prices" for the purpose of influencing sale of wrinkle finishes are prohibited (R. 16, 18). The number of days credit to be given licensees' customers, the discount for early payment, and the circumstances under which the discount may be allowed are prescribed (R. 18). There are detailed provisions, including the furnishing of supporting data, regulating quantity discounts (*ibid.*). On sales of "concentrated material," licensees are required to charge one dollar per gallon more

than the established price, and such material is defined in terms of the ingredients of the product, which licensees must determine by a prescribed test (R. 16). On sale of uncolored finish, which carries the lowest prices, the licensee, if chargeable with knowledge that his customer intends to convert this product into a colored finish, must charge the price prescribed for finish of the color in question (*ibid.*). As to further details of the control exercised over prices and terms of sale, see *supra*, pp. 9–12.

The facts which have been set forth demonstrate, we believe, that appellees' conspiracy comprises the elements held to be determinative of illegality in the *Gypsum* decisions, and that the case is directly governed by these decisions.

K&S in its motion to dismiss the appeal contended that no violation of the Sherman Act was shown as to it since the complaint does not allege that K&S continued to own the New Wrinkle stock which it acquired upon the organization of that corporation (R. 25–26). Obviously K&S's participation in the conspiracy was not dependent upon either its original acquisition or its continued ownership of stock of New Wrinkle. The complaint charges a continuing conspiracy to which both K&S and New Wrinkle were parties (par. 13, R. 3) and that one of the elements of the conspiracy at its inception was organization of New Wrinkle by K&S and its co-conspirator, Chadeloid, and New Wrinkle's subsequent par-

ticipation in the conspiracy (par. 16, R. 3–4). The fact that, pursuant to the conspiracy, K&S and Chadeloid exchanged their patents for stock of New Wrinkle, instead of exchanging them for money or other consideration, is irrelevant to the conspiracy set forth. Continued ownership of New Wrinkle's stock by K&S is equally irrelevant.[10]

II

ASIDE FROM OTHER CONSIDERATIONS, APPELLEES' CONSPIRACY VIOLATES THE SHERMAN ACT BECAUSE NEW WRINKLE DID NOT MAKE OR SELL THE PRODUCT COVERED BY ITS PATENTS AND THEREFORE WAS NOT WITHIN ITS PATENT MONOPOLY WHEN IT PROVIDED IN ITS LICENSE AGREEMENTS FOR FIXING UNIFORM MINIMUM PRICES AND TERMS OF SALE

A patentee, having the exclusive right to make, use and vend his patented product, may reserve the whole field of manufacture and sale to himself. He may, if he chooses, engage in manufacture and sale, but also license others to make and sell. The *General Electric* case held that, in this situation, the patentee may forbid his licensee to undercut the patentee's own price. The

[10] The fact that K&S and Chadeloid received the stock of New Wrinkle in exchange for their patents is relevant to point III, *infra*, pp. 29–35, in that it shows the pooling of the patents of separate owners through the medium of a controlled corporation. But since the price control achieved through such pooling of patents was thereafter continued by agreement, it is immaterial in this connection whether those who pooled their patents for the purpose of fixing prices continued in stock control of New Wrinkle.

grounds of decision were that patent law permits a patentee to obtain as a reward for his invention both royalty income from licensing others and profits derived from his own sales, and that a license requirement that the licensee maintain the prices at which the patentee sells is a normal and reasonable means of assuring that receipt of income from licensing does not interfere with the full profit possibilities of the patentee's own sales of the patented product. The Court put the matter as follows (272 U. S. 476, 490):

> One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, "Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making them and selling them myself."

But when a patentee chooses as the source of his reward solely the royalties obtainable from granting patent licenses to others, a license provision that the patentee may fix minimum prices uniform for all licensees bears no relation to preservation of the profit possibilities of the

patentee's own sales of the patented product.[11] Granting of license agreements providing for such price fixing is purveying, in addition to patent protection, the opportunity to market the patented product at fixed and maintained prices. The reward of the patentee from royalty payments then represents both the value to the licensee of patent protection and the value to him of sale of the product free from price competition. Patents confer upon their holders no such privilege "to monopolize an industry through price control" (*United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 400), and under such price-fixing licenses the reward to the patentee would come in part, and in many instances in main part, "not from any preference of the public for the patented product, but from the preference of the [licensee] competitors for a mutual arrangement for price-fixing" (*United States* v. *Masonite Corp.*, 316 U. S. 265, 281). Thus to purvey price-fixing licenses is remote from price restriction on a particular licensee or a group of licensees as a means of preventing impairment of the patentee's opportunity to secure reward for his invention from his own sales of the patented product, as upheld in the *General Electric* case.

Since New Wrinkle did not make or sell the patent product (par. 11, R. 2), under the prin-

[11] In this case the amount of New Wrinkle's royalty income bears no relation to the sales price of its licenses. The royalty payable is the flat rate of 5¢ per gallon (R. 12).

ciples set forth above New Wrinkle was not within its patent monopoly when it provided in its license agreements for fixing minimum prices and terms of sale uniform for all its licensees. And the price-fixing conspiracy to which it was a party plainly violated the Sherman Act if the price fixing was not within the patentee's monopoly.

In *United States* v. *Vehicular Parking, Ltd.*, 54 F. Supp. 828 (D. Del.), a corporation which had acquired various patents on parking meters did not make or sell such meters but entered into substantially similar license agreements with concerns, representing from 95% to 98% of the industry, providing for fixing licensees' minimum prices and certain terms and conditions of sale. The facts were held to establish a conspiracy to restrain and monopolize interstate commerce in violation of Sections 1 and 2 of the Sherman Act, and the *General Electric* case was held not to apply where the patentee was a mere patent holding company. The court said (p. 838) that the decision in that case was "predicated upon the patentee making and vending the patented device," and said further (*ibid.*):

> There is nothing in that case which indicates that the patentee can agree with group-licensees to fix the price at which all may sell. * * * The price fixing, then, is for the benefit of the licensees—not to protect Vehicular's [the patentee's] sales of meters because Vehicular is not engaged in manufacturing and sale.

III.

ASIDE FROM OTHER CONSIDERATIONS, APPELLEES' CONSPIRACY VIOLATES THE SHERMAN ACT BECAUSE THE CONSPIRACY INVOLVED COMBINING THE PATENTS OF TWO OWNERS FOR THE PURPOSE OF FIXING PRICES

The conspiracy alleged in the complaint began with, and was the outcome of, negotiations between K&S and Chadeloid to effect a pooling of their patents in order to "set up a licensing system under which prices for the entire wrinkle finish industry would be fixed" (par. 15, R. 3). As a result of the negotiations, the two patent owners entered into a contract which provided for organizing New Wrinkle, assigning their patents to it, and the granting by it of price-fixing licenses under these patents (par. 16, R. 3–4). The purpose, as well as the effect, of the conspiracy thus formed was to fix identical minimum prices for substantially all wrinkle finishes manufactured and sold in the United States (par. 23, R. 5).

We submit that a combination thus to use the patents of two patent owners for the purpose of price fixing is beyond the scope of the patent monopoly. The monopoly does not expressly include the right to fix the price at which the patentee's licensee may sell the product manufactured under the patent. *United States* v. *Line Material Co.*, 333 U. S. 287, 311. It has nevertheless been held that this right is impliedly conferred under circumstances in which exercise

of such a right is "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." *United States* v. *General Electric Co.*, 272 U. S. 476, 490. However, the patentee's right to fix prices is limited to securing "a reward for his invention"; he goes beyond this when the effect of price-fixing license provisions is to "enhance the value of his own trade position by eliminating or impairing competition." *United States* v. *Masonite Corp.*, 316 U. S. 265, 282.

In *United States* v. *Line Material Co.*, 333 U. S. 287, the holder of a dominant patent and the holder of a subservient patent entered into cross-licensing agreements which gave to Line, the holder of the subservient patent, the exclusive right to license the dominant patent. Line thereupon granted licenses under both patents, and provided therein that the licensee maintain Line's sales prices on devices which embodied Line's patent. The Court pointed out (p. 307) that although in terms Line's price fixing was limited to its own patent, the price fixing was also effective as to devices embodying the necessary dominant patent. The Court accepted the continued authority of the *General Electric* case insofar as that case had held that a single patentee may restrict his licensee's sales price. But the Court held (p. 311) that the patentee's monopoly, as given recognition in the *General Electric* case, does not sanction a merger of the price-fixing powers of two

patentees, and does not permit "separate owners of separate patents by cross-licenses or other arrangements to fix the prices to be charged by them and their licensees for their respective products." The Court pointed out (p. 315) that what was unlawful was not the cross-licensing itself but use of the control thereby given to fix prices.

Since the price fixing in which the defendants in *Line Material* had engaged was in clear violation of the Sherman Act, apart from patent or other statutory exemption, the defendants' knowing joinder in like price-fixing licenses brought their combination under the prohibitions of the Sherman Act when their claim of patent privilege failed.

In the present case the circumstances under which separate owners joined their patents for price-fixing purposes point more strongly to action beyond the scope of the patent monopoly than in the *Line Material* case. The dissenting opinion in that case noted (333 U. S. 326) that the cross-licensing—the means by which the patents of separate owners were used in combination—did not either require or provide for price fixing. Here, in contrast, the agreement for uniting the patents of separate owners provided for using the combined patents to set up a price-fixing licensing system. Thus a major factual element which led to the cleavage in the Court as to the proper result in the *Line Material* case is lacking here.

Under the *Line Material* decision, the Sherman Act would have been violated if K&S and Chadeloid had cross-licensed each other and one of them had, pursuant to the authority thereby conferred, granted uniform price-fixing licenses under both patents, accepted by licensees with knowledge of like acceptance by others. The same fixing of prices through combining separately owned patents was achieved when K&S and Chadeloid organized New Wrinkle and assigned their patents to it for the purpose of setting up a price-fixing licensing system. We submit that what they were not authorized to do directly they were not authorized to do through a corporate agent created by them to accomplish the forbidden end.

In *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, this Court unanimously condemned price limitations effected through assignment of patents to a third person to act as licensor. There patents held by Standard and two of its competitors were assigned by them to the secretary of a trade association. He, in turn, granted licenses under the patents and fixed the prices at which licensees might sell. The Court, in holding that these arrangements violated the Sherman Act, said (p. 49) that the "element of the patent in the case at bar cannot confer immunity * * *, for the reasons we have

stated." Earlier in its opinion the Court said (p. 48):

> The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law.

The *Line Material* case applied the general principle of the *Standard Sanitary* case where separate patent owners had combined their patents through cross licensing, and had thus achieved price fixing. We submit that the method by which such combination is achieved—whether by "cross-licenses or other arrangements"—is immaterial. See *Line Material* case, p. 311. The Sherman Act "is aimed at substance rather than form." *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 227. In situations where, as here, there has been a strong public interest to be protected, this Court has consistently looked to the realities of the transaction."[11]

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[11] The Court has refused to find a valid corporate reorganization for tax purposes where, although the transaction met the literal requirements of the statute, it served no business purpose. *Gregory* v. *Helvering*, 293 U. S. 465; cf. *Bazley* v. *Commissioner*, 331 U. S. 737. It has disregarded the existence of a family partnership between husband and wife, valid under state law, and taxed the entire income to the husband, when the partnership income in fact was earned by the husband. *Commissioner* v. *Tower*, 327 U. S. 280; cf. *Commissioner* v. *Culbertson*, 337 U. S. 733. The corporate

In *United States* v. *Masonite Corp.*, 316 U. S. 265, Masonite, holding patents on hardboard, manufactured and sold its patented product, and also entered into patent licensing agreements with companies engaged in the sale of competing products. The agreements authorized the licensees to sell Masonite's patented product as *del credere* agents, at not less than the prices at which Masonite sold. This Court held that when Masonite thus used the selling organizations of its competitors for marketing its patented product, the exclusive right to "vend" given by patent law was exhausted when Masonite put the product in the hands of its "agents," and that the scope of the patentee's right to vend "cannot be determined by reference to the private law of sales alone." 316 U. S. 265, 278–280. The Court said (p. 280):

> Since patents are privileges restrictive of a free economy, the rights which Congress has attached to them must be strictly construed so as not to derogate from the general law beyond the necessary requirements of the patent statute. *United States* v. *Univis Lens Co., Inc., supra.* So far as

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entity concept has been disregarded when necessary to give minority stockholders redress against injury to their interests by a majority stockholder. *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, 322.

> the Sherman Act is concerned, the result must turn not on the skill with which counsel has manipulated the concepts of "sale" and "agency" but on the significance of the business practices in terms of restraint of trade.

To permit combining separately owned patents for price-fixing purposes through the medium of a corporation created and controlled by the patentees, when like combination through the medium of cross-licensing stands forbidden, would not only be highly anomalous; it would leave open a wide loophole for the utilization of patents to bring an industry under price control.

In *United States* v. *General Instrument Corp.*, 87 F. Supp. 157 (D. N. J.), several patentees organized a new corporation and assigned their patents to it with power to grant licenses thereunder. For a period of time the corporation issued licenses fixing licensees' minimum sales prices. The court (p. 193) rejected the defense that this price fixing was permissible under the *General Electric* case, and held that the *Line Material* case was controlling. The court said that the fact that the licensor was the patent holding company, rather than one of the patentees, "is a mere matter of form and does not alter the substance of the arrangement."

IV

NEW WRINKLE VIOLATED THE SHERMAN ACT BY BEING A PARTY TO A CONSPIRACY TO RESTRAIN INTERSTATE COMMERCE IN WRINKLE FINISHES, IRRESPECTIVE OF WHETHER IT WAS ITSELF ENGAGED IN INTERSTATE COMMERCE

Appellee New Wrinkle argues that since it does not manufacture or sell any of the wrinkle finishes it is not in interstate commerce, and therefore cannot be guilty of violating the Sherman Act.

It is elementary that what Section 1 of the Sherman Act condemns is the act of conspiring to impose unlawful restraints on interstate or foreign commerce. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225. A party to such a conspiracy therefore violates the Act whether or not his own interstate trade is restrained and whether or not he is engaged in any interstate trade. From the outset the Act has been applied to those who were parties to the forbidden conspiracies though they were not engaged in the commerce subjected to restraint. This Court has so applied the Act to trade associations in scores of cases, beginning with the cases of *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505. It was so applied at an early date to a holding company formed to bring two competing railroads under single control (*Northern Securities Co.*, v. *United States*,

193 U. S. 197) and to labor unions and their members (*Loewe* v. *Lawlor*, 208 U. S. 274). And the Court recently rejected a similar contention in *United States* v. *Women's Sportswear Association*, 336 U. S. 460, 464, wherein it said:

> The trial court appears to have dismissed the case chiefly on the ground that the accused Association and its members were not themselves engaged in interstate commerce. This may or may not be the nature of their operation considered alone, but it does not matter. Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

Similarly unsound is New Wrinkle's contention that the mere granting of patent licenses does not subject it to the Sherman Act. *Standard Oil Company* v. *United States*, 283 U. S. 163. This Court there stated (pp. 168–9):

> The defendants contend that the agreements assailed relate solely to the issuance of licenses under their respective patents; that the granting of such licenses, like the

> writing of insurance, *New York Life Ins. Co.* v. *Deer Lodge County,* 231 U. S. 495, is not interstate commerce; and that the Sherman Act is therefore inapplicable. This contention is unsound. Any agreement between competitors may be illegal if part of a larger plan to control interstate markets. * * * Moreover, while manufacture is not interstate commerce, agreements concerning it which tend to limit the supply or to fix the price of goods entering into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act.

The complaint herein charges generally that appellees have been and are engaged in a combination and conspiracy in restraint of trade and commerce among the several states (par. 13, R. 3). In amplification, it is alleged that although New Wrinkle is not engaged in commercial manufacture and sale, it owns or controls patents which it licenses to manufacturers located "throughout the various states" (pars. 11–12, R. 2–3), and that a "substantial portion of the wrinkle finishes made by licensees is sold to purchasers in states other than those in which the finishes are manufactured and to purchasers in the Dominion of Canada, and is shipped from one state to another, and from various states of the United States to various locations in the Dominion of Canada in the ordinary course of business" (par. 12, R. 3). The complaint describes the manner

in which the sales prices of the manufacturer-licensees were fixed (pars. 19–22, R. 4–5), and then states that the conspiracy had the intended effect "of fixing and maintaining identical and unreasonably high and arbitrary minimum prices, discounts and selling conditions and terms for substantially all wrinkle finishes manufactured and sold in the United States, and of eliminating competition between the defendants and co-conspirators in the sale of such finishes" (par. 23, R. 5).

These allegations that prices are fixed on substantially all sales in the United States, that a substantial portion of the sales is to purchasers in other states (par. 12, R. 3), and that New Wrinkle was a party to the price-fixing conspiracy (par. 13, R. 3), clearly charge a conspiracy by New Wrinkle to fix prices in interstate commerce.

Since New Wrinkle was a party to all the price-fixing contracts and, indeed, was organized in large part for the purpose of fixing prices for the industry (pars. 15–21, R. 3–5), it is obvious that, under the above allegations, it has restrained trade and commerce among the several states whether or not it was in interstate commerce itself. Accordingly, we remain of the view expressed in the Government's jurisdictional statement that New Wrinkle's contention that it is outside the prohibitions of the Act because it is

not engaged in interstate commerce appears almost frivolous.

New Wrinkle argued, in a motion to dismiss, that the Government has not appealed from the district court's adverse decision as to it. The contention was that New Wrinkle's motion to dismiss the complaint had been based upon the commerce issue and that the Government had not assigned error to the district court's decision on this point or included it within the Questions Presented in the Statement as to Jurisdiction. It is difficult to believe that the cryptic order of the district court (R. 27) could have rested on so obviously insubstantial a ground. Compare the order as to K&S (R. 28). In any event the Government's assignment of errors is sufficient to allege error in this respect. The assignments were not required to be more specific in the absence of any statement of reasons by the district court, and the point was referred to in the Government's Statement as to Jurisdiction (p. 7, n. 3). The Government's reply to New Wrinkle's motion to dismiss deals with this question fully, and it seems unnecessary to repeat that discussion here. This Court has power, of course, to review a plain error even if unassigned. Supreme Court Rule 27 (6); *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 412, and cases cited.

CONCLUSION

For the foregoing reasons, the judgments of the district court dismissing the complaint should be reversed.

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OCTOBER TERM, 1951

No. 250

THE UNITED STATES OF AMERICA,
Appellant,

vs.

NEW WRINKLE, INC., AND THE KAY & ESS COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION OF NEW WRINKLE, INC., TO DISMISS.

H. A. TOULMIN, JR.,
Counsel for Appellee, New Wrinkle, Inc.

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

(ON PLAINTIFF'S APPEAL TO THE SUPREME COURT OF THE UNITED STATES)

Civil Action No. 1006

Filed Aug. 3, 1951

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NEW WRINKLE, INC. AND THE KAY & ESS COMPANY,

Defendants

MOTION TO DISMISS BY NEW WRINKLE, INC. THE APPEAL OF THE UNITED STATES OF AMERICA PURSUANT TO RULE 12, PARAGRAPH 3, RULES OF THE SUPREME COURT OF THE UNITED STATES

Statement of the Legal Situation

This case was dismissed below on the sole ground of lack of jurisdiction under the Anti-Trust laws of the United States. The Court did not deal with any factual matters except those admitted by the Government *on jurisdiction* in its Petition to the extent they dealt with jurisdiction: no

answer has been filed and no issue joined and there are no findings of fact or conclusions of law. Defendant's counsel appeared solely for the purpose of contesting the jurisdiction.

Government's Misconception of Remedy

The Government has misconceived its remedy as it has failed to appeal from the decision against it on the issue of lack of jurisdiction.

To the contrary, it has appealed on three "questions presented", all of which are based upon *non-jurisdictional*, factual allegations upon the assumption that the defendant by its motion to dismiss has admitted the non-jurisdictional allegations of alleged fact to be true. This is not the case and it is not the law as hereinafter pointed out.

The Government has appealed only on matters of law, based upon factual issues not yet tried out, not yet at issue and upon which the Defendant, New Wrinkle, Inc. has not yet had its day in Court.

A motion to dismiss for lack of jurisdiction of the subject matter by counsel, specially appearing for that sole purpose, does not carry with it an admission of the correctness of the allegations in the bill of complaint.

Obviously, the Government is seeking by this short-cut to put upon this Court the burden of deciding moot questions involving factual matters with no record to support the factual allegations in the questions presented except the Government's self-serving Petition. For instance, in question number one, numerous factual issues are, "Did the patentees make such agreements as described factually"? Did it involve "an entire industry"? Was there "conscious participation". In the second question presented factual issues such as follows: "What patents were assigned to a corporation organized by them"? What are the facts as to the alleged conspiracy?

As to question three presented to the Court by the Government there was a question of fact obviously raised by this paragraph.

Motion to Dismiss

We, therefore, move to dismiss on the following grounds:

1. Because the United States of America appealed on three legal and factual questions based upon its unanswered complaint on which no issue has been joined or hearing had on the merits, raising questions on the merits not at issue in the Court below and not appealable here.

2. Because the United States failed to appeal on the fundamental issue of lack of jurisdiction decided against it below.

3. Because the United States is raising moot questions to get a ruling on legal questions not at issue.

Action of Court Below

The Court dismissed the case for lack of jurisdiction over the subject matter as there was no interstate commerce, in view of the averments in paragraph I (2), and the averments in paragraph III (11) first sentence of the Complaint that "New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1927," it is plain that it has not engaged in inter-state commerce and therefore could not be guilty of a violation of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

Memorandum on Motion to Dismiss by New Wrinkle, Inc.

What has happened in this appeal is that the Government has failed to appeal from the decision of the Court below that there is no jurisdiction under the Anti-Trust

laws as a matter of law over patent licenses offered to any manufacturer to take or give up at any time without restriction as to who gets the license or how long he keeps it. This simple issue decided by the Court below upon the jurisdictional statement of the Government in its complaint has not been appealed from.

To the contrary, Government counsel have appealed on three wholly different questions involving factual matters that this Court would require either that they be agreed upon or that issue be joined, a trial be had and findings of fact and conclusions of law be made of record for its guidance because such matters of fact are critical in determining justly the three questions presented.

These three questions were not involved in the motion to dismiss for lack of jurisdiction. The three questions presented *contained no word dealing with jurisdiction and raised no issue of jurisdiction, but are confined to issues that are triable only if there is jurisdiction.*

The Government's action is premature in appealing on those three questions: it has failed to appeal on the question of whether one who issues licenses under patents with the usual provisions and is not engaged in commercial manufacture or sale of the subject matter is entering into interstate commerce within the making of the Anti-Trust laws. That simple question was not appealed from as decided by the Court below against the United States.

It would be a great hardship upon the defendant, New Wrinkle, Inc. to have the three questions presented heard in this Court on which it has not yet had its day in Court below on the factual and legal matters involved on the merits.

Ex Parte Pleading No Basis for "Questions Presented":

This Court has held that an appeal or petition will not be heard when a final decree has not been entered on the merits of any matter involving litigation upon Plaintiff's petition or other *ex parte* affidavits: the Defendant must have an opportunity to set up and establish its defenses on those matters that go to the merits in the event the case is not otherwise dismissed for lack of jurisdiction which has nothing to do with the merits.

In Meccano, Limited, v. John Wanamaker, New York, 253 U.S. 136, 141, 142, this Court said:

> "Petitioner maintains that its motion for final decree upon the merits should have been sustained. But the appeal was from an interlocutory order and the court could only exercise powers given by statute. On such an appeal a cause may be dismissed if it clearly appears that no ground exists for equitable relief; *but finally to decide a defendant's rights upon the mere statement of his adversary,* although apparently supported by ex parte affidavits and decrees of other courts, *is not within the purview of the act. He is entitled to a day in court with opportunity to set up and establish his defenses. The motion for final judgment was properly overruled.* Eagle Glass & Manufacturing Co. v. Rowe, 245 U.S. 275, 281."

In the instant case the Government has filed its complaint which is divisible into two parts: first, the question of jurisdiction upon which it lost in the District Court (from which it has not appealed); and second, it now appeals on questions on the merits raised by its bill of complaint on which the Defendant, New Wrinkle, Inc. has not, of course, been heard. The Government now endeavors to secure a judgment of this Court on the merits and legal question based on facts not yet settled on the ground that the dismissal for lack of jurisdiction also carries with

it an admission by New Wrinkle, Inc., the Defendant, that its allegations in its bill of complaint other than those dealing with jurisdiction are true and uncontested.

Such is not the law.

Jurisdiction Sole Issue, But Not Raised by United States Appeal:

Consequently, all that the Government can raise on an appeal is the sole question raised by New Wrinkle, Inc. on its motion to dismiss, namely, whether there is jurisdiction in the Federal Court over mere patent licensing without any inter-state commerce being involved. Moving to dismiss on the ground of lack of jurisdiction carries no admission of the correctness of non-jurisdictional allegations and statements of fact *ex parte* in a bill of complaint. This Court so said in *United States et al* v. *Corrick et al*, 298 U.S. 435, 437, 438:

> "On appeal from the granting or refusal of an interlocutory injunction *our inquiry is limited to the question whether the court abused its discretion.*[1] The appellants urge that the action taken constituted such an abuse for the reason that want of jurisdiction is evident upon the fact of the bill. With this contention we agree."

That the questions presented by the United States were not questions decided by the District Court nor presented to it and no judgment has been had upon those questions that depend upon factual proof and can only be decided after the threshold question of jurisdiction is settled; that is, whether patent licensing only is and of itself inter-state commerce which gives rise to the application of the Anti-Trust laws of the United States.

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[1] *Farrington* v. *Tokushige*, 273 U. S. 284, 290; *United Fuel Gas Co.* v. *Public Service Comm'n*, 278 U. S. 322, 326; *Alabama* v. *United States*, 279 U. S. 229, 230; *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 338.

These three legal questions presented by the appeal of the Government of the United States, *are not yet at issue, the Court did not pass upon them and the Appeal is premature* both because the jurisdictional question remains and because the three questions presented involved questions of law and fact not yet passed upon by the District Court and moot at this time. In *Stoll* v. *Gottlieb*, 305 U.S. 165, 176, this Court said:

> "It is frequently said that there are certain strictly jurisdictional facts, the existence of which is essential to the validity of proceedings and the absence of which renders the act of the court a nullity. Examples with citations are listed in Noble v. Union River Logging R. Co. 23" [147 U.S. 165].

A court is not empowered to declare for the Government for the benefit of future cases principles or rules of law on the state of facts which have not yet been contested and decided and which cannot affect the result as to the thing in issue in this case before you at this moment, that is, jurisdiction. If there be no jurisdiction, the rest of the case becomes moot and the only purpose in seeking a decision on the three points said by the Government to be an issue is to secure a ruling of this Court by the Government for future cases.

United States v. *New Wrinkle*

Moot Questions Presented to this Court by the Three Grounds of Appeal of the United States

The Government is endeavoring by its three grounds of appeal to get this Court to decide moot legal questions not involved in the action of the Court below in dismissing the case for lack of jurisdiction. Why did not the government appeal on that simple jurisdictional issue?

The answer is that it is trying to get a decision on other matters covered by its points on appeal without trial,

without the necessary factual background, in an effort to turn this Court into *nisi prius* Court without giving the Defendant, New Wrinkle, Inc. a chance to be heard on such issues, providing there is jurisdiction which the Court below holds is not so.

This has long been the policy of this Court to avoid speculative moot questions. As Mr. Justice Gray said in *California* v. *San Pablo and Tulare Railroad*, 149 U.S. 308, 314:

> ". . . *But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.* No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.
>
> "The case at bar cannot be distinguished in principle from previous cases in which writs of error have been dismissed by this court under similar or analogous circumstances. Lord v. Veazie, 8 How. 251, 255; Cleveland v. Chamberlain, 1 Black, 419; Wood Paper Co. v. Heft. 8 Wall. 333; San Mateo County v. Southern Pacific Railroad, 116 U.S. 138; Little v. Bowers, 134 U.S. 547; Singer Manuf. Co. v. Wright, 141 U.S. 696. See also Elgin v. Marshall, 106 U.S. 578.
>
> "Writ of error dismissed."

To this same effect is *United States of America* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, (Mr. Chief Justice White); and *United States* v. *American-Asiatic Steamship Company et al.*, 242 U.S. 537 (Mr. Chief Justice White).

There is only one issue here to be heard now and *that is jurisdiction:* the three factual issues, the sole issues, presented by the Government are premature and have not been passed upon by the Court below. The Government has failed to appeal from the lower Court's decision dismissing this case because of no jurisdiction under the

Anti-Trust laws of the United States, i.e., mere patent licensing without more is not commerce. (Our attached brief elaborates our point). If this were not the rule that only the issue decided by the Court below and the portion of the pleadings so involved would come before this Court, litigants would fear to move in accordance with their rights under the rules in the District Court for fear if they won the Government would then be able to take as settled statement of the fact its uncontested *ex parte* allegations which have never been examined by any Court. If the rule be as the Department of Justice assumes it to be in this case, then no litigant would risk a motion to dismiss for lack of jurisdiction and be deprived of its rights accordingly. Such, however, is not the law and the efforts of the Government on this appeal to have a decision on factual matters as yet unanswered and unheard below must fail under the decisions of this Court.

No Relief:

Sound ground for dismissing an appeal is when it is clear that the Court can afford no relief. The Government having failed to take its appeal on the issue decided below and having substituted other issues involving Findings of Fact and Conclusions of Law that would be necessary from a formal trial in order to dispose of such questions, cannot now urge such grounds of appeal because this Court could afford no relief without a trial having been duly had and without having the benefit of Findings of Fact and Conclusions of Law.

The failure of the Government to appeal the correct issue must carry its own dismissal. As this Court said in *Interstate Circuit, Inc., et al. v. United States*, 306 U. S. 208, 226:—

"... The production of weak evidence when strong is available can lead only to the conclusion that the

strong would have been adverse. Clifton v. United States, 4 How. 242, 247. Silence then becomes evidence of the most convincing character. Runkle v. Burnham, 153 U. S. 216, 225; Kirby v. Tallmadge, 160 U. S. 379, 383; Bilokumsky v. Tod, 263 U. S. 149, 153, 154; Vajtauer v. Commissioner of Immigration, 273 U. S. 103, 111, 112; Mammoth Oil Co. v. United States, 275 U. S. 13, 52; Local 167 v. United States, 291 U. S. 293, 298."

The Government's Appeal Does Not Open Up the Whole Case:

The government cannot appeal by going into questions not decided by the District Court. As this Court said in *United States* v. *Borden et al.*, 308 U. S. 188, 193:

> ". . . (5) When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. *The Government's appeal does not open the whole case.*"

It is well settled that no legal maneuver is legitimate as a means whereby an opinion as to the applicable law may be extracted from the Appellate Court in advance of final hearing. *Meccano, Limited* v. *John Wanamaker*, New York, 253 U. S. 136.

Moot Issues in Three "Questions Presented":

There is no jurisdiction because no inter-state commerce is involved. The issues as to the allegations otherwise by the Government are moot and not for consideration at this time by this Court. *United States of America* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 467; *United States* v. *American-Asiatic Steamship Company et al.*, 242 U. S. 537.

The Mere Fact That Patent Licenses As Personal Services Deal with Products Shipped in Inter-state Commerce Does Not Make Patent Licensing Inter-state Commerce:

The foregoing rule has been frequently followed by this Court. The Anti-Trust laws are based upon inter-state commerce only. *United States* v. *Joint Traffic Association*, 171 U. S. 505, 567, 568, 573. They do not cover personal services, such as invention and licensing of patents, unless the patentee steps out of the patent laws and enters into inter-state commerce—both must concur. *Hopkins* v. *United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604. A patentee's intellectual work protected by statute is in the same category as the working men with their hands. *United Leather Workers International Union, Local Lodge or Union No. 66, et al.* v. *Herkert & Meisel Trunk Company et al.*, 265 U. S. 457; *Industrial Association of San Francisco, et al.* v. *United States*, 268 U. S. 64; *United States* v. *Yellow Cab Co. et al.*, 332 U. S. 218, 230, 234; holding that taxi cab services engaged locally in transporting passengers travelling from state to state "that such transportation is too unrelated to interstate commerce to constitute a part there, under the meaning of the Sherman Act."

It should be remembered that New Wrinkle, Inc. licensed any person, firm, or corporation with a provision for fixing the minimum sales price of its licensees pursuant to *United States* v. *General Electric Company et al.*, 272 U. S. 476 in reliance upon that decision, repeatedly affirmed by this Court. *It does not manufacture.*

It merely exercises its legal rights under the patents it owns to license anybody who can use the patents and they may keep their license for as long as the licensee pleases or give it up when it pleases. "The *General Electric* case construes that as giving a right to a patentee to license

another to make and vend at a fixed price." *United States v. Line Material Co. et al.*, 333 U. S. 287, 312.

The Government failed to raise, by its appeal, this simple issue and tries to substitute issues not decided by the Court below for reasons this Court will doubtless understand. Where a licensor does not sell anything in commerce nor ship any goods in commerce nor control anything that a licensee does except that he pays a royalty and must sell at a stipulated minimum price under the patent, only the patent laws apply.

As a matter of interest, our position is the real issue of jurisdiction, not appealed from, is as follows:

In connection with the original basis of the Motion to Dismiss, which is the averment in paragraph I (2) and III (11) that "New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1927", and therefore is not engaged in interstate commerce.

The activities of New Wrinkle, Inc., to be within the prohibition of the Sherman Act, a matter of inter-state commerce and must be in restraint of trade or commerce among the several states, Sherman Act, Section 1: The Complaint must state a case by showing that two grounds exist which are both essential to sustain a Complaint under the Anti-Trust Acts.

A. Interstate commerce and such inter-state commerce which is a part of a larger plan to control inter-state markets, *outside of the patent laws.*

Standard Oil Company vs. United States, 283, U. S. 163, 169.

B. Unreasonable restraint of inter-state commerce, *outside of the patent laws.*

This defendant's position is that whatever action it has taken has been purely within the scope of its lawful patent

monopoly and *is neither in inter-state commerce nor a violation of the Sherman Act.* New Wrinkle has not entered into a conspiracy with any other entity. So long as it stays within the patent laws it cannot be stopped under the Anti-Trust Laws. *United States* v. *Line Material Co.*, (March 8, 1948), 333 U. S. 287; 304, 307, 308, 309, 310, 312; and cases cited.

The Anti Trust statute is based upon inter-state commerce only: New Wrinkle, Inc. is not so engaged.

In *Hopkins* v. *United States*, 171 U. S. 578, and in *Anderson* v. *United States*, 171 U. S. 604. *A patentee is merely selling the results of his labor in making the invention which he is authorized to do by the government of the United States when he issues a patent license.*

Even if he combines with others he is merely disposing of his personal services by way of a patent license and is not engaging in inter-state commerce because he sells nothing that moves as a physical thing in trade. So long as you stay within the patent law and do not step out into any commercial non-patent operation you are not affected by the Sherman Anti-Trust Act.

United States v. *Line Material Co.*, 333 U. S. 287, affirming *United States* v. *General Electric Co.*, 272 U. S. 476, *United States* v. *Univis Lens Co.*, 316 U. S. 216, etc.

Where an inventor or his assignee own the patentable results of his labor, issues license contracts and does no manufacturing, his position is that of any other laborer. In *Apex Hosiery Co.* v. *Ledder et al.*, 310 U. S. 469, this Court held that controlling goods that would be ultimately shipped in inter-state commerce and in stopping a business from shipping in inter-state commerce was no ground for charging a conspiracy in restraint of trade or commerce between the several states. *United Mine Workers of America et al.* v. *Coronado Coal Company et al.*, 259 U. S.

344; *United Leather Workers International Union, Local Lodge or Union No. 66, et al.* v. *Herkert & Meisel Trunk Company et al.*, 265 U. S. 457; *Apex Hosiery Co.* v. *Leader et al.*, 310 U. S. 469.

Patent Licenses are merely a means of selling the technical brains and technical services of the inventor. As such, it has been the settled law, repeated again in *Apex Hosiery Co.* v. *Leader, et al.*, 310 U. S. 469, 501, 502, that personal services and the product of personal services and their sale and even a combination of persons among themselves in the sale of their services or the results therefrom is not considered an illegal restraint of trade at common law nor under the Sherman Act, either because it is not thought to be unreasonable or because it was not deemed a restraint of trade.

So we see here that these inventions in wrinkle finish and the sale of the rights under them are merely a way of opening to the public the sale of the technical services of the inventors and those who succeed to their rights and as such license contracts expressing such sale of services are no more inter-state commerce under the Sherman Act than are the services of employees and technicians who make hosiery or any other product even though their actions do in effect serve to restrain trade. In the instant case we do not restrain trade, but we promote it by widely distributing the services through patent licenses.

A stream rises no higher than its source and patents and what they cover constitute no more than the rights of the individual inventors. It is our proposition that an individual inventor has a right under the law to sell or not sell, and to license or not license, and if he licenses to fix the price at which his licensee sells. This Court has said so many times and as recently as in *United States* v. *Line Material Co.*, 333 U. S. 287, affirming *United States* v. *General*

Electric Co., 272 U. S. 476. Therefore, having been granted this right under the patent law to fix prices which is legal per se under patents and licenses, being merely the sale of personal services approved by the Supreme Court in the *Apex Hosiery* case as not being the subject of inter-state commerce even when individuals combine their services, we respectfully submit that the license contracts under patents assembled together from various inventors in order to open up the rights to all their patents to anybody is not inter-state commerce and even if it were could not be a restraint of trade. *Apex Hosiery Company v. Leader, et al.*, 310 U. S. 469, 502:

> ". . . . Since the enactment of the declaration in Sec. 6 of the Clayton Act that 'the labor of a human being is not a commodity or article of commerce . . . nor shall such (labor) organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in the restraint of trade under the antitrust laws,' . . . ."

(a) *Merely licensing under the patent law is not engaging in commerce—mere legal right to enjoy the statute is a matter of law and not a matter of commerce.*

The Defendant, New Wrinkle, Inc., has done two things as to which there is no dispute as a matter of fact: first, it has entered into a lease of its patent rights which rental agreement has the technical name under the patent law of a "License". This is authorized by patent law.

Secondly, New Wrinkle, Inc. has placed in its license agreement a requirement that it may specify the price at which its licensees sell the patented wrinkle finishes. This is legal as established in *United States v. General Electric Co.*, 272 U. S. 476; *United States v. Univis Lens Co., Inc.*, 316 U. S. 216; and *United States v. Line Material Co.*, 333 U. S. 287.

The foregoing two things are performed under the patent law and are approved by the statutes and the courts.

New Wrinkle, Inc. does not sell anything in commerce nor does it ship any goods in commerce nor does it control anything that a licensee does except that he pays five cents a gallon and must sell at a stipulated minimum price under the patent.

In *United Shoe Machinery Corp., et al.* v. *United States*, 258 U. S. 451, 465, the Supreme Court held that the fact that United Shoe *leased its machines* and shipped them across state lines and made leases between citizens of different states did not constitute inter-state commerce in and of itself. The Court said: "It is true that the mere making of the lease of the machines is not of itself interstate commerce."

Ware, et al. v. *Mobile County*, 209 U. S. 405.

In each case of the companies licensed by New Wrinkle, Inc. they manufacture their goods in a particular state and sell them from their factories. The license to do so is a mere contract between citizens of different states.

As Mr. Justice Stone said in *Western Live Stock, et al.* v. *Bureau of Revenue, et al.*, 303 U. S. 250:

> "*That the mere formation of a contract between persons in different states is not within the protection of the commerce clause,* at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question. Paul v. Virginia, 8 Wall. 168; Hooper v. California, 155 U. S. 648; New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495; cf. Ware & LeLand v. Mobile County, 209 U. S. 405; Engel v. O'Malley, 219 U. S. 128" (p. 253).

Accordingly, the Court held that "the business of preparing, printing and publishing magazine advertising is

peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce'' (p. 258).

In the instant case New Wrinkle, Inc.'s action is finished with granting the license and supplying any technical information which may help the licensee. Its action is, therefore, ''distinct'' from the subsequent manufacturer, who is a licensee, whose products may be circulated in inter-state commerce.

Contracts for future delivery on a Board of Trade for the movement of goods in inter-state commerce ''are not in and of themselves interstate commerce.'' *Hill* v. *Wallace*, 259 U. S. 44, 69.

This Court followed a settled rule in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 32-3: *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 604; *Hopkins* v. *United States*, 171 U. S. 578, 588-9, 602, that contracts between citizens of different states and nothing more are not inter-state commerce. The fact that as a result physical goods move in commerce across state lines is not controlling.

(b) *As a matter of law license contracts cannot be a matter of commerce.*

In *Industrial Association of San Francisco* v. *United States*, 268 U. S. 64, Mr. Justice Sutherland held, on behalf of a unanimous court, that contracts between contractors and dealers in building materials which had the effect of regulating movement of materials in interstate commerce, but which were separable from such movements, as in the case of the patent licenses here are separable from the resulting subsequent manufacture and shipment by wrinkle finishes by the licensees and are not inter-state commerce.

Levering & Garrigues Co. v. *Morrin*, 269 U. S. 103;
United Leather Workers v. *Herkert & Meisel Trunk Co.*, 265 U. S. 457;
Local 167 v. *United States*, 291 U. S. 293;

United States v. *Hutcheson*, 312 U. S. 219;
Associated Press v. *Labor Board*, 301 U. S. 103.

(c). *Manufacturing and selling or entering into commercial activities may be commerce, but a patent license under the law does not constitute doing business. They may relate to things or events in other states than that of their execution but they do not contain any obligation to engage in any form of inter-state commerce.*

The Supreme Court has been consistent that even inter-state contracts are not the subject of inter-state commerce simply because they are negotiated between citizens of different states, where the contract itself is to be completed and carried out wholly within the borders of a state, although such contracts incidentally affect inter-state trade.

In the instant case the contract between The Kay & Ess Company and New Wrinkle, Inc. was concluded within the State of Ohio where New Wrinkle, Inc. had its headquarters at Dayton, Ohio, and where The Kay & Ess Company had its headquarters at Dayton, Ohio.

In the case now at bar the legality of a patent license contract and of a price control feature under the patent laws of the United States has been repeatedly upheld by the Supreme Court and so long as a patent license is of the character as in this case the Sherman Anti-Trust Laws do not apply. *United States* v. *General Electric*, 272 U. S. 476.

So far as we are aware no case has ever held that a contract of license under the patent laws, even though it may incidentally affect the movement of inter-state goods is inter-state commerce. The government has cited no cases to that effect.

In the instant case, the patent laws have already for many years authorized such patent licenses. To make such

licenses subject to the Sherman Anti-Trust Law activities under them must meet two conditions:

(a) To be beyond the authority of the patent laws as interpreted by the Supreme Court of the United States.

(b) To do more than merely constitute contracts between citizens of different states, pursuant to the patent laws, even though they incidentally affect or effect ultimately the movement of licensed goods in interstate commerce.

It is significant that in the government's Complaint the only thing that it claims is a violation of the Sherman Anti-Trust laws, is the fixing of prices by the licensor at which the licensee will make his first sale. Even in its brief below the Government admits that this is the law and that it is legal to fix a price under a patent license on a first sale under the doctrine of the *General Electric* case. Its sole excuse for re-litigating this issue against this little company, New Wrinkle, Inc., is that the sustaining of the *United States* v. *General Electric* in *United States* v. *Line Material* and *United States* v. *Gypsum* was by a divided court.

Therefore, these contracts of license being authorized by the Federal Statutes come within the exception referred to in *United States* v. *Underwriters Association*, 322 U. S. 533, 560, by Mr. Justice Frankfurter, where he pointed out that if Congress had defined insurance with particularity and had enacted legislation specifically authorizing and controlling such contracts, there would have been a different result. Logically, therefore, as patent licenses are under statutory authority of the United States they are not subject to the Anti-Trust Laws except where they are used in inter-state commerce *outside of the patent laws*[2] as an

[2] "* * * In these circumstances, *we must proceed to determine the issues on the assumption that General Electric continues as a precedent.* Furthermore, we do not think it wise to undertake to explain, further than the facts of this case require, our views as to the applicability of patent price limi-

instrument for which they were not intended or authorized to unreasonably restrain competition.

(d) *Any dealings between The Kay & Ess Company and New Wrinkle, Inc. were in the State of Ohio and were not inter-state commerce.*

(e) These contracts of license do not cause any movement of goods or affect the sale of goods as between the licensor and licensee. The act of making any contract which does not stipulate for the performance of an act or transaction

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tation in the various situations listed by the government. On that assumption where a conspiracy to restrain trade or an effort to monopolize is not involved, a patentee may license another to make and vend the patented device with a provision that the licensee's sale price shall be fixed by the patentee. The assumption is stated in this way so as to leave aside the many variables of the General Electric rule that may arise. * * * (333 U. S. 287, 304.)

"* * * In the absence of patent or other statutory authorization, a contract to fix or maintain prices in interstate commerce has long been recognized as illegal *per se* under the Sherman Act. This is true whether (333 U. S. 287, 307) the fixed price is reasonable or unreasonable. It is also true whether it is a price agreement between producers for sale or between producer and distributor for resale. It is equally well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly. * * * The progress of our economy has often been said to owe much to the stimulus (333 U. S. 287, 308) to invention given by the rewards allowed by patent legislation. The Sherman Act was enacted to prevent restraints of commerce *but has been interpreted as recognizing that patent grants were an exception. Bement* v. *National Harrow Co., supra,* 92, 21 Cong. Rec. 2457. * * * (333 U. S. 287, 309) *The monopoly granted by the patent laws is a statutory exception to this freedom for competition and consistently has been construed as limited to the patent* grant. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 452, 455; *United States* v. *Univis Lens Co.,* 316 U. S. 241; *Hartford-Empire Co.* v. *United States,* 323 U. S. 386. It is not the monopoly of the patent that is invalid. It is the improper use of that monopoly. (333. U. S. 287, 310.) * * *

"* * * The patent statutes given an exclusive right to the patentee to make, use and vend and to assign any interest in this monopoly to others. *The General Electric case construes that as giving a right to a patentee to license another to make and vend at a fixed price.* * * *" (333 U. S. 287, 312).

of inter-state commerce is not in itself inter-state commerce. This has been held to be true even though the contract be effected by exchange of communications across state lines:

United States v. *Line Material Co.*, 333 U.S. 287, 304, 308, 309, 310, 312 (March 8, 1948.)

New York Life Ins. Co. v. *Cravens*, 178 U. S. 389;
Ware & LeLand v. *Mobile County*, 209 U. S. 405;
New York Life Ins. Co. v. *Deer Lodge County*, 231 U. S. 495.

"The mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce."

Jewel Tea Co. v. *Williams* (CCA 10) 118 F. (2d) 203, citing *Lipson* v. *Socony Vacuum Corporation*, (CCA 1; 87 F. (2d) 265; *Moore* v. *New York Cotton Exchange*, 270 U.S 593; *Ware & LeLand* v. *Mobile County*, 209 U.S. 405; *Schechter Corp.* v. *United States*, 295 U.S. 495.

Conclusion:

In view of the foregoing, it is obvious that the Plaintiff has misconceived its action.

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FILED
AUG 17 1951
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 250

THE UNITED STATES OF AMERICA,
Appellant,

vs.

NEW WRINKLE, INC., AND THE KAY & ESS COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION OF THE KAY & ESS COMPANY TO DISMISS

SAMUEL L. FINN,
Counsel for Appellee.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. 1006

Filed August 7, 1951.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

NEW WRINKLE, INC., AND THE KAY & ESS COMPANY,
Defendants

MOTION TO DISMISS PLAINTIFF'S APPEAL

Now comes Defendant The Kay & Ess Company, and moves the Court to dismiss the Government's appeal from the District Court's order dismissing the Complaint against Defendant The Kay & Ess Company, on the grounds that no substantial question is presented thereby.

Memorandum

In the Government's statement of "Questions Presented" on this appeal, it is the Government's position that three questions are presented. An analysis of these questions, in the light of the allegations in the Complaint, makes it clear

that, as to Defendant The Kay & Ess Company, the questions presented are so minimal as not to warrant the attention of the Supreme Court.

Questions No. 1 and 2

The first two questions presented are, in substance, the same question. They revolve around the Plaintiff's allegations that Defendant The Kay & Ess Company and Chadeloid Chemical Company entered into an agreement whereby they created New Wrinkle, Inc. and assigned to New Wrinkle the various patents of Defendant The Kay & Ess Company and Chadeloid. As alleged by the Plaintiff, this agreement was entered into November 2, 1937.

There can be no question but that the above-mentioned agreement of November 2, 1937, and licenses thereafter issued by New Wrinkle, were within the doctrine of *U. S.* v. *General Electric Company*, 272 U. S. 476. The Plaintiff, on page 7 of its petition on appeal, now takes the position that the prohibition against cross-licensing by two patent owners laid down by *U. S.* v. *Line Material Company*, 333 U. S. 287 by inference condemns the organization of New Wrinkle for the purposes alleged.

The specious nature of this argument is made apparent by the Plaintiff's failure to allege ownership by Defendant Kay & Ess of any New Wrinkle stock after November 2, 1937. Whereas, under the *Line Material* case, the two patentees who engaged in the cross-licensing agreement remained owners of the patents involved, there is nothing in the Plaintiff's Complaint to suggest continued ownership by Defendant Kay & Ess of any stock in New Wrinkle, and the Complaint itself discloses a lack of ownership by Defendant Kay & Ess in the patents after their assignment to New Wrinkle.

It is this failure of the Complaint to allege any further ownership by Kay & Ess of New Wrinkle stock after November 2, 1937 which makes the Complaint defective as to Defendant Kay & Ess, and which, it is respectfully submitted, formed the basis for the District Court's dismissal of the Complaint. The first license agreement between New Wrinkle and any of the licensees, as alleged by the Complaint, became effective on or about May 7, 1938, at which time, for all that appears in the Complaint, Defendant Kay & Ess may well have been in the same position as any one of the other approximately two hundred licensees alleged, insofar as any relationship with New Wrinkle was concerned. There is no allegation whatsoever that on or about May 7, 1938, when the alleged license agreements became effective, that Defendant Kay & Ess had any interest in or control of Defendant New Wrinkle.

It is submitted that the fact situation alleged by the Government comes squarely within the approval of the *General Electric* case, and that the later decisions in the *Line Material* case and in *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 564, 339 U. S. 959, 340 U. S. 76, do not alter the law as applied to Defendant Kay & Ess.

Question No. 3

The Plaintiff contends that the third question presented is "whether the *General Electric* case authorizes a *non-manufacturing* patentee to fix the prices at which its licensees sell." (Plaintiff's italics.) It is respectfully submitted that, insofar as Defendant Kay & Ess is concerned, this third question is not applicable. Defendant Kay & Ess is not a "non-manufacturing patentee", and therefore this appeal raises no question whatsoever, let

alone a substantial question, with respect to Defendant Kay & Ess, insofar as the third question presented is concerned.

Summing up, the most that can be said for the Government's position is that on November 2, 1937, Defendant Kay & Ess and Chadeloid entered into an agreement to organize New Wrinkle and to assign to New Wrinkle all of their patent rights relating to wrinkle finishes, and that New Wrinkle did then license various manufacturers under the patents in question. Basing its contention on a totally unwarranted extension of the doctrine laid down by the *Line Material* case, the Government contends that this agreement was illegal. Further, in the absence of allegations of continued ownership or control of New Wrinkle by Defendant Kay & Ess, the most that can be said about Defendant Kay & Ess is that it became a licensee from New Wrinkle. The Government, in its Complaint, did not consider the relationship of the approximately two hundred other licensees sufficiently substantial to warrant their inclusion as defendants. It is respectfully submitted that this appeal from the District Court's order dismissing the Complaint against Defendant Kay & Ess is no more substantial than the position of the other licensees, and it should, therefore, be dismissed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 250.

UNITED STATES OF AMERICA,

Appellant,

v.

NEW WRINKLE, INC. and THE KAY & ESS COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

REPLY BRIEF BY NEW WRINKLE, INC. TO REPLY ON MOTION TO DISMISS BY THE UNITED STATES OF AMERICA, APPELLANT.

H. A. TOULMIN, JR.,

Counsel for New Wrinkle, Inc., specially appearing for the sole purpose of contesting jurisdiction of this Court and for no other purpose.

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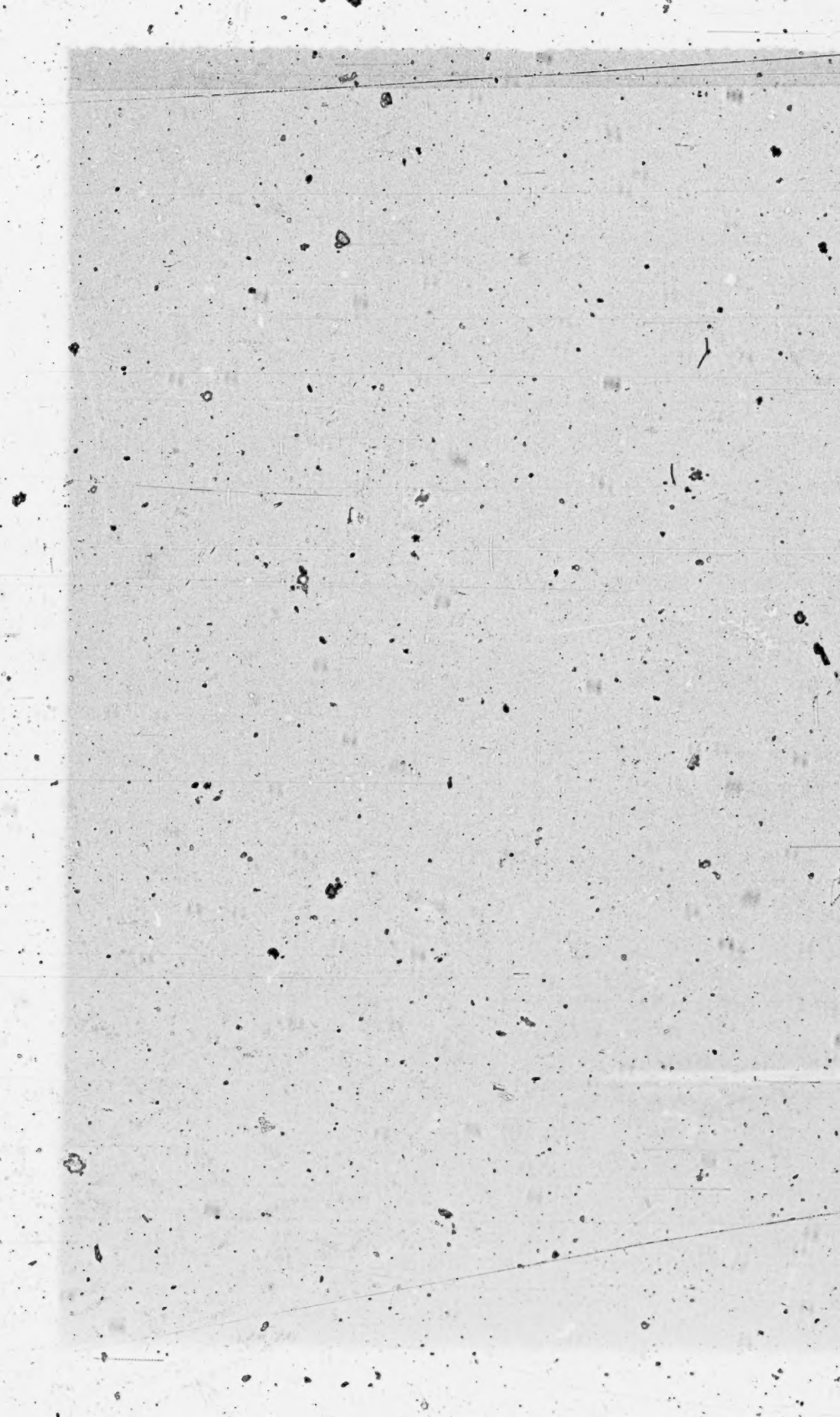

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In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 250.

UNITED STATES OF AMERICA,

Appellant,

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NEW WRINKLE, INC. and THE RAY & ESS COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

REPLY BRIEF BY NEW WRINKLE, INC. TO REPLY ON MOTION TO DISMISS BY THE UNITED STATES OF AMERICA, APPELLANT.

The Government's attempt to shift its ground and rectify its failure to take an appeal from the decision of the District Court as to New Wrinkle, Inc., compels a Reply Brief.

Our position is a simple one:

(a) The Government failed to take an appeal on the issue decided against it below of whether a patent license granted to any manufacturer who wanted it, by a licensor who was not a manufacturer, with a stipulation as to the price at which its licensee could sell, constituted interstate commerce within the meaning of The Anti-Trust Laws of the United States.

(b) An open-ended license, open to any manufacturer, is within the jurisdiction of the patent

laws and, therefore, exempt by statute from The Anti-Trust Laws.

The Government quotes paragraphs 11 and 12 of the Bill of Complaint against New Wrinkle, Inc. at page 5 of its brief. These two paragraphs recite factual matters.

The Government attempts to claim that its paragraph 23 *constituting its legal conclusions* must be admitted as true because of the Motion to Dismiss. That is incorrect under the law as established by this Court in *Meccano, Limited v. John Wanamaker, New York*, 253 U. S. 136, 141, 142.

We address ourselves to the foregoing two issues raised in the reply brief. Our position is, as to the first, that the Government failed to take an appeal, not having made the correct "Assignment of Errors," the correct "Statement as to Jurisdiction" or the correct statement of "Questions Presented." As to the second proposition mentioned above and discussed by the Government at the end of its brief, our position is that the averments of paragraphs 11 and 12 show no jurisdiction in this Court because mere patent licensing is within the patent laws and is, therefore, within the statutory exemption of those laws from the operation of the Anti-Trust Laws. Therefore, there is no jurisdiction in the Court under the Anti-Trust Laws over such conduct as averred in paragraphs 11 and 12.

In detail, we observe as follows as to the position of the Government in its brief.

(1) "An Assignment of Errors must accompany the Petition for Appeal. Such an Assignment must preserve every point which Appellant may wish to raise in the Supreme Court." See "Supreme Court Practice" by Stern and Gressman, p. 210. *Comment*—In the Government's brief they realize they failed to assign error on the

part of the District Court in dismissing for lack of jurisdiction. That question was not raised in their Assignment of Errors. They have appealed only as to Kay & Ess.

(2) "The jurisdictional statement required by Rule 12 (1) is as important in the taking of an appeal as the citation is unimportant." P. 213, "Supreme Court Practice" by Stern and Gressman. *Note*—This book is cited by the Government and refutes its position that the jurisdiction is not important. Page 4 of the Government's brief says that our position was "too frivolous to warrant more extensive treatment than the footnote reference in note 3 of the jurisdictional statement." The footnote was not an assignment of error, as required by the Rules, to raise the issue of jurisdiction.

(3) Note that in the above mentioned book at page 215 it says:

> "In 1936 the Court amended Rule 12 so as to give counsel notice that the Jurisdictional Statement should include 'a statement of the grounds upon which it is contended the questions involved are substantial' (297 U. S. 733), citing *Zucht v. King*."

Also see 316 U. S. 715. He further states:

> "Thus all Jurisdictional Statements, from state or federal courts, must now state the grounds for believing the question to be substantial." (p. 216.)

The Government's position in its brief is that the question of jurisdiction which the Court below decided "was too frivolous to warrant more extensive treatment than the footnote reference in note 3 of the Jurisdictional Statement," yet in the same breath it is trying strenuously to overcome its failure to appeal on this important question. It admits that it did not assign error on the part of the District Court for dismissing New Wrinkle, Inc. for lack of jurisdiction.

Under Rule 12 it is required that the Appellant state the grounds which it believes to be substantial in support of its position and having failed to state such grounds in the appeal of New Wrinkle, Inc. it is in order to dismiss its appeal because it is not shown that as to New Wrinkle, Inc. there is any substantial reason for the appeal.

(4) It admits that the "Questions Presented" on its appeal were substantial only as to Kay & Ess Company. See the Government's brief, page 2. The Government admits that it failed to present the issue of jurisdiction in the New Wrinkle appeal in its Statement as to Jurisdiction, the very essence of the motion below resulting in the Court's judgment thereon sustaining New Wrinkle. The Government states (p. 2):

> "In the Questions Presented in its Statement as to Jurisdiction the Government set forth three questions with respect to the rights of a patentee to fix prices (all of which related to the point raised by Kay & Ess), *but did not mention the commerce question raised by New Wrinkle.*"[1]

Thus, the Government admits that it failed in its Statement as to Jurisdiction in the New Wrinkle case to raise the issue on the only point on which the District Court dismissed New Wrinkle below.

(5) The Government, after saying that the jurisdictional matter as to New Wrinkle, which was serious enough for the Court below to decide, was "too frivolous to warrant more extensive treatment than the footnote" (p. 4) and "that to the extent that the court below may have agreed with New Wrinkle's contention, the Government regarded its reasoning as erroneous" (p. 4), took no appeal on any issue as to New Wrinkle, Inc.

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[1] Emphasis ours unless otherwise stated.

The Rules of this Court require it. Even the Government itself should show such respect as to comply if it wished to do so.

If that be a fact, why did not the Government assign the lower Court's judgment against it as in error and raise the issue in its Statement as to Jurisdiction and Questions Presented? Having failed to do so, it cannot raise the question now and this appeal of the Government as to New Wrinkle should be dismissed.

The Government's position that it need not include this question of jurisdiction as to New Wrinkle in its "Statement as to Jurisdiction" because it was included in the Assignment of Errors is not well taken because *its statement on the jurisdiction was confined to the Government's right to appeal, but it did not include the fundamental question as to New Wrinkle in either the Statement as to Jurisdiction or the statement on Questions Presented as to the jurisdiction of the Court over New Wrinkle conducting no other business than that of a patent owner licensing its patents to all comers on an equal and fair basis to everyone.*

That simple question could have been raised if the correct appeal had been taken. It was not.

The Government, having failed either in its "Statement as to Jurisdiction" or in its "Questions Presented" or "Assignment of Errors" to raise the issue correctly of any error in the District Court's dismissal of New Wrinkle for lack of jurisdiction, that issue which the Government admits it thinks is "frivolous" and which it admits it did not raise, **makes the question as to New Wrinkle moot, leaving only the Kay & Ess appeal to be considered by this Court on the "Questions Presented," which the Government says "(all of which related to the point raised by Kay & Ess), but did not mention the commerce question raised by New Wrinkle."** (p. 2.)

The "Questions Presented" in the appeal (and therefore meant by its "Assignment of Errors") *are admitted by the Government in its brief not to apply to New Wrinkle.* (Government Reply Brief, p. 2.)

(6) The difficulty with the Government's position, when its relies upon the Assignment of Errors as raising the issue of the error of the District Court in dismissing New Wrinkle, Inc., is that in its reply brief it admits that the three questions to be presented to the Court based upon those Assignment of Errors do not refer to the actions of New Wrinkle, Inc.

In view of the fact that the Government admits that the questions for this Court to consider only relate to the Kay & Ess case, we respectfully submit we are correct that the Government failed to raise the question of dismissal for lack of jurisdiction over New Wrinkle and recognized that it did not intend its Assignment of Errors to cover this point because it says of its points in the "Statement as to Jurisdiction" that "(all of which related to the point raised by Kay & Ess)", (Government's Reply Brief, p. 2).

We, therefore, respectfully urge:

(a) The Government has failed to raise the issue of jurisdiction over New Wrinkle decided against it below.

(b) The points on which it wishes to present to this Court it admits in its brief (p. 2) "(all of which related to the point raised by Kay & Ess), but did not mention the commerce question raised by New Wrinkle." In view of this we say that the question has not come up here appropriately to determine the interstate commerce question of New Wrinkle.

(7) *There is no Jurisdiction Per Se: Ground for Motion to Dismiss Appeal.*

The Averments of the Bill of Complaint, paragraphs 11 and 12 *per se*, show there is no interstate commerce involved: that the actions of New Wrinkle are within the patent laws and, therefore, exempt from the Anti-Trust Laws.

We also direct the Court's attention to the fact that the Averments of Fact and Conclusions of Law quoted on page 5 of the Government's Brief *in paragraph 23 which have to do with the legal conclusions by the Government are not admitted by a Motion to Dismiss.* It is significant that the Government's statement "These allegations, of course, are admitted for purposes of dealing with the motions to dismiss" (p. 6); **cites no authority. The law is contrary to that proposition.**

There is a distinction between an averment of facts as in paragraphs 11 and 12 of the Bill of Complaint quoted on page 5 of the Government's Reply Brief, and the Government's allegations in paragraph 23, *which are its legal conclusions.* Such legal conclusions are not admitted. The authorities on this point are:

In *Meccano, Limited v. John Wanamaker, New York,* 253 U. S. 136, 141, 142, this Court said:

> "Petitioner maintains that its motion for final decree upon the merits should have been sustained. But the appeal was from an interlocutory order and the court could only exercise powers given by statute. On such an appeal a cause may be dismissed if it clearly appears that no ground exists for equitable relief; **but finally to decide a defendant's rights upon the mere statement of his adversary,** although apparently supported by ex parte affidavits and decrees of other courts, *is not within the purview of the act. He is entitled to a day in court with opportunity to set up and establish his defenses. The motion for final judgment was properly overruled.* Eagle Glass & Manufacturing Co. v. Rowe, 245 U. S. 275, 281."

The District Court decided that a mere patent licensee who is not manufacturing, selling or shipping anything in commerce and who stipulates the price under the doctrine of *United States v. General Electric*, 272 U. S. 476, does not come within the jurisdiction of the Sherman Anti-Trust Law because such actions are not interstate commerce. The Government failed to reopen that issue by its appeal.

It is obvious that paragraph 23 in the Bill of Complaint against New Wrinkle does not raise the jurisdictional issue here. *Stoll v. Gottlieb*, 305 U. S. 165, 176.

The jurisdictional facts are raised by the Government's Bill of Complaint in paragraphs 11 and 12 printed at page 5 of its Reply Brief. On the basis of those averments, *which deal with facts and not legal conclusions*, we moved to dismiss in the District Court below because such a state of facts does not show a cause of action under the Anti-Trust Laws of the United States and because there is no interstate commerce within the meaning of that term as applied by this Court for the reason that mere patent licensing, a lease contract, is not *per se* interstate commerce.

As the Government now denominates the jurisdictional question over New Wrinkle as to which it failed to appeal as "frivolous" (p. 4) the language of Mr. Justice Gray in *California v. San Pablo and Tulare Railroad*, 149 U. S. 308, 314, is most appropriate:

> "* * * *But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.* * * *"

The Anti-Trust Laws are based upon interstate commerce only. *United States v. Joint Traffic Association*, 171 U. S. 505, 567, 568, 573. Mere patent licensing is not inter-

state commerce. *Hopkins v. United States*, 171 U. S. 578, 588-9, 602; *Anderson v. United States*, 171 U. S. 604. That privilege being statutory under the patent laws exempts the patentee from the action of the Anti-Trust Laws so long as it stays within the patent laws.

The Sherman Act was enacted to prevent unreasonable restraint of commerce. This has been interpreted by this Court as recognizing that the statutory ground of patents is an exception to the operation of the Anti-Trust Laws so long as the patentee does not step outside of the lawful execution of his rights, such as patent licensing, under the Patent Laws. This Court so defined it in *United States v. Line Material Co.*, 333 U. S. 287, 304, 308, 309, 310, 312, in this language:

> "* * * The Sherman Act was enacted to prevent restraints of commerce *but has been interpreted as recognizing that patent grants were an exception.* Bement v. National Harrow Co., supra, 92, 21 Cong. Rec. 2457. * * * (333 U. S. 287, 309) *The monopoly granted by the patent laws is a statutory exception to this freedom for competition and consistently has been construed as limited to the patent grant.* Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 452, 455; United States v. Univis Lens Co., 316 U. S. 241; Hartford-Empire Co. v. United States, 323 U. S. 386. * * *" (p. 310.)

Patent licensing with a price control is within the patent laws as said by this Court:

> "The *General Electric* case construes that as giving a right to a patentee to license another to make and vend at a fixed price."
>
> *United States v. Line Material Co.*, 333 U. S. 287, 312.

Personal services, such as evidenced by patents and patent licenses, when subject to special statutory enact-

ment, can be so exempted by Congress from the Anti-Trust Laws. *United States v. Underwriters Association*, 322 U. S. 533, 560. The Patent Laws make such an exception so that to violate the Anti-Trust Laws one must step outside the Patent Laws. The granting of patent licenses is not such a step. *Standard Oil Company v. United States*, 283 U. S. 163, 169; *United States v. Line Material Co.*, 333 U. S. 287, 304, 307, 308, 309, 310, 312.

A patent license is a lease: leasing per se is not interstate commerce. "It is true that the mere making of a lease of the machines is not of itself interstate commerce." *United Shoe Machinery Corp., et al. v. United States*, 258 U. S. 451, 465.

"The mere formation of a contract between persons in different states is not within the protection of the commerce clause." *Western Live Stock, et al. v. Bureau of Revenue, et al.*, 303 U. S. 250, 253.

Contracts between citizens of different states and nothing more are not interstate commerce. *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 32-3; *Moore v. New York Cotton Exchange*, 270 U. S. 293, 604. "It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce." *Hill v. Wallace*, 259 U. S. 44, 69.

Contracts, which are separable from the movement of materials such as a patent license and any subsequent action by the licensee in his manufacturing, do not come within the commerce clause and are not interstate commerce even though movement of materials in interstate commerce results. *Industrial Association of San Francisco v. United States*, 268 U. S. 64.

We, therefore, submit that the Government knows full well that it lacks jurisdiction over New Wrinkle, Inc., and that is why it made no statement as to jurisdiction

over New Wrinkle, Inc., assigned no specific error on this specific question and admits its three "Questions to be Presented" for argument before this Court do not apply to New Wrinkle, Inc. (p. 2) saying "all of which related to the point raised by Kay & Ess."

CONCLUSION.

We, therefore, say to the Court that the Government has not presented any questions for decision as to New Wrinkle, Inc., but only as to Kay & Ess, according to its own brief. It has not taken any appeal or presented questions on the issue of jurisdiction solely raised by New Wrinkle, Inc.

The lack of jurisdiction is obvious on the face of the papers before this Court in that paragraphs 11 and 12 of the Bill of Complaint quoted by the Government on page 5 of its brief show normal operation of the Patent Laws of the United States. New Wrinkle's acts are without the jurisdiction of the Anti-Trust Laws because (a) not constituting interstate commerce and (b) of a statutory exemption under the Patent Laws.

We urge the Court to dismiss the appeal as to New Wrinkle, Inc.

Respectfully submitted,

H. A. TOULMIN, JR.,

Counsel for New Wrinkle, Inc., specially appearing for the sole purpose of contesting the jurisdiction of this Court and for no other purpose.

August 1951.

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In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 250.

UNITED STATES OF AMERICA,
Appellant,

v.

NEW WRINKLE, INC. and THE KAY & ESS COMPANY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF OF APPELLEE, NEW WRINKLE, INC.

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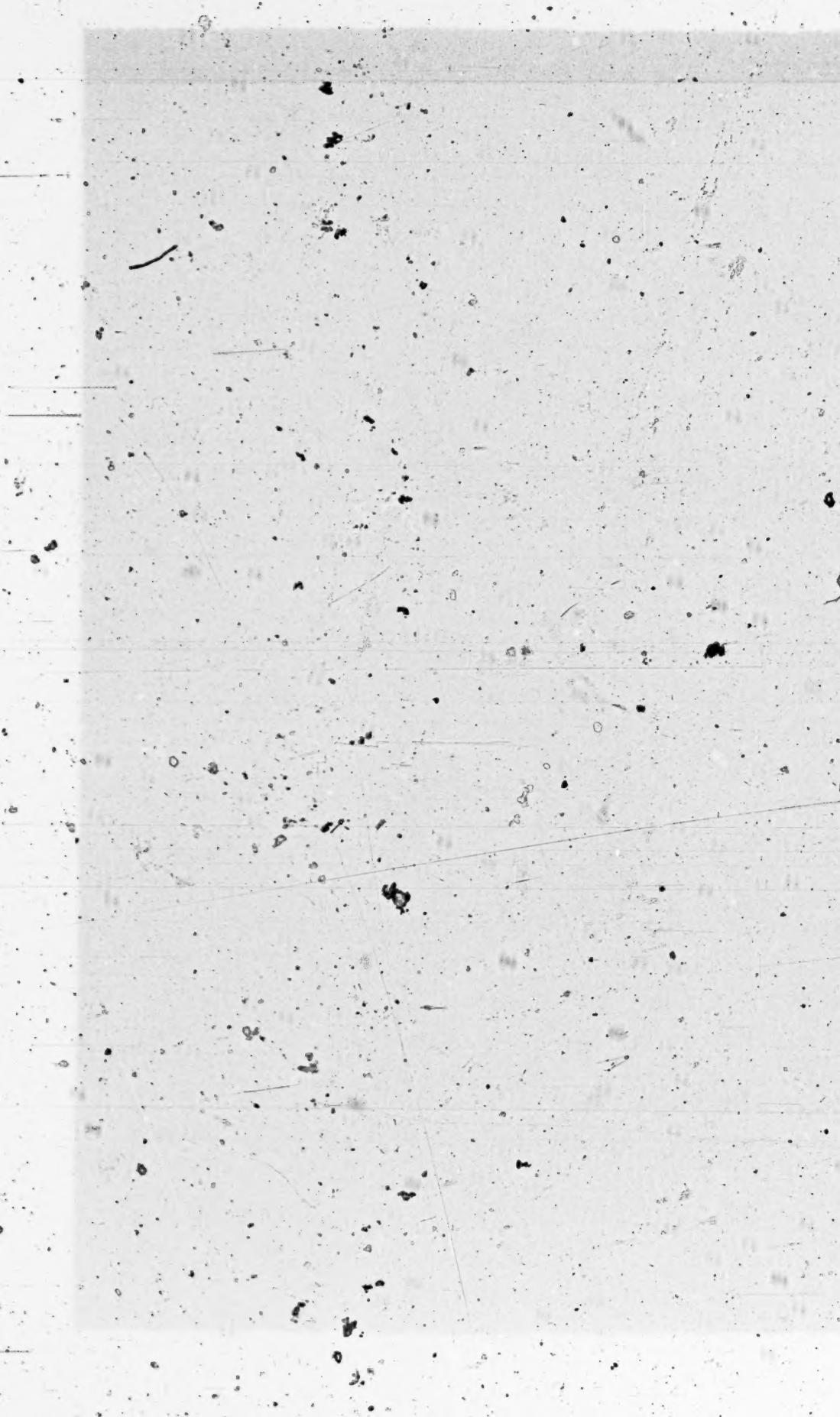

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In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 250.

UNITED STATES OF AMERICA,
Appellant,

v.

NEW WRINKLE, INC. and THE KAY & ESS COMPANY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF OF APPELLEE, NEW WRINKLE, INC.

OPINION BELOW.

The Court below sustained the motion of New Wrinkle, Inc. to dismiss for lack of jurisdiction, after arguments and briefs, on the grounds that patent licensing by New Wrinkle, Inc., which does no manufacturing, was not "commerce"; and patent licenses were solely within the Patent Laws and not within the purview of the Sherman Anti-Trust Act.

JURISDICTION AND STATUTES.

As noted above the District Court found as to New Wrinkle Inc. that its mere issuing of patent licenses, under the Patent Laws without manufacturing, was not "commerce" within the meaning of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 4) commonly known as the "Sherman Act."

In view of the fact that this Court has stated there is "probable jurisdiction," this brief will present New Wrinkle's position on the basis (a) if there is jurisdiction, then no cause of action is stated and there is no violation of Sections 1 and 4 of the "Sherman Act" under the facts pleaded (but not the legal conclusions in the complaint); and (b) there is no jurisdiction over mere patent licensing, unaccompanied by manufacturing, which the Appellant admits the Appellee, New Wrinkle, did not do (T. R. 2 § 11).

The Appellant failed to appeal on the jurisdictional issue raised by New Wrinkle on which it prevailed below.

It is Appellee's position that the only issue, at most, before this Court is the question of jurisdiction: and that, if such issue is decided against it, this case should be remanded for answer and trial to present all the facts on the merits to the District Court.

However, out of respect for this Court having noted "probable jurisdiction," we are presenting our views on the merits to the extent that the ultimate facts as pleaded by the Appellant in its complaint, *less its argument and legal conclusions,* will permit us to do. We, therefore, defer discussion of the jurisdictional question until the end of this brief.

STATUTE INVOLVED.

The pertinent provisions of Sections 1 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 4), commonly known as the Sherman Act, are as follows:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal:

* * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *.

STATE OF THE RECORD BELOW.

New Wrinkle, Inc. made a motion to dismiss for lack of jurisdiction under the Anti-Trust Laws of the United States based upon the facts as to jurisdiction in the complaint (T. R. 23-25). Other non-jurisdictional facts or argumentative conclusions were not involved in our motion to dismiss and therefore not admitted to be true. *Meccano, Ltd. v. John Wanamaker*, 253 U. S. 136. The motion was sustained (T. R. 27).

NO APPEAL BY APPELLANT ON JURISDICTIONAL ISSUE DECIDED AGAINST IT BELOW.

There is no question presented by the Appellant on jurisdiction in its three questions presented to this Court.

APPELLANT'S QUESTIONS PRESENTED OMIT CONTROLLING FACTS.

The Appellant has presented three questions for consideration by this Court. Its statement of the questions presented *omits facts of vital importance which characterize the conduct of the Appellee*, New Wrinkle, as pleaded by the Appellant in its complaint, with the consequence

that these questions are inaccurate, misleading and do not form a basis for applying the law in view of the facts in this case.[1]

Every Anti-Trust case must be decided on the basis of its own facts; and not on the basis of theoretical questions disregarding those facts. Appellant by its omissions so phrased its questions so as to force only the answer the Appellant wants, irrespective of the fact that the facts in this case compel a completely different answer.

Chicago Board of Trade v. United States, 246 U. S. 231, 238; *Appalachian Coals, Inc., et al. v. United States,* 288 U. S. 344, 360, 361; *Sugar Institute v. United States,* 297 U. S. 553, 600.

QUESTIONS PRESENTED BY THE APPELLEE BASED UPON THE FACTS IN THIS PARTICULAR CASE.

Factual Background from the Appellant's Complaint for Questions Presented.

A patent holding company, Chadeloid Chemical Company, held basic patents on an enamel finish called "wrinkle." A non-competitive manufacturer, Kay & Ess Company, owned practical patents on wrinkle finishes it was manufacturing. Litigation arose between them under Chadeloid's broad patents and a patent impassé followed. To settle the problem both parties *assigned* their patents to a new Company, New Wrinkle, Inc.

In return for substantially equal amounts of common stock and preferred stock, of which Chadeloid secured the major share, the patents of both Chadeloid and Kay & Ess were sold to New Wrinkle, Inc. in 1937 (T. R. 3).

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[1] *Chicago Board of Trade v. United States,* 246 U. S. 231, 238; *Appalachian Coals, Inc., et al. v. United States,* 288 U. S. 344, 360, 361; *Sugar Institute v. United States,* 297 U. S. 553, 600.

New Wrinkle, Inc. is not and never has been a manufacturer (T. R. 2). It then offered to all manufacturers in the industrial paint field a non-exclusive license, Exhibit C (T. R. 3 & 4), under which it licensed under all of its present patents and future patents for 5¢ a gallon royalty. The Licensee gave nothing except the royalty to New Wrinkle. The Licensee could cancel on 3 months notice. Paragraph 7 of the license provided New Wrinkle could direct the minimum price at which the Licensee sold. There was no price control of New Wrinkle's activities, as it did not manufacture and was not competitive with the Licensee manufacturer. It did not secure any rights under the Licensee's patents.

Under the price control provision (a) the Licensee could cancel immediately any time within 30 days after so being informed of the price; and (b) New Wrinkle announces its policy of basing the price on the cost of labor and materials reported from time to time by the U. S. Department of Labor and U. S. Department of Commerce and announced as its policy the following:

> "* * * **it being the intent and purpose of the Licensor to open to the entire trade the use of these patents so licensed at the lowest price consistent with a reasonable profit to the manufacturer, Licensee, the trade, and to this Licensor.** * * *"

It was stipulated by Licensor it would treat all Licensees alike as to royalty and price of Licensee's product so directed.

This license was so offered to the entire industry, as the license now stands, to accept or reject. Several hundred companies have accepted it. As it was unknown in the beginning whether this new finish would be manufactured and sold by the industry in quantity, it was necessary to secure the signatures of some nineteen manufac-

turers before their signatures would be binding on all of them in order to insure sufficient volume at the 5¢ royalty to make the return and value of the license worth-while. No preference was given these nineteen manufacturers.

Upon this set of facts based on the complaint, the questions presented for your decision on the merits are:

QUESTIONS PRESENTED.

1. Whether a settlement of the litigation between non-competitors and a patent holding company (Chadeloid) owning broad patents with a manufacturer (Kay & Ess), owning practical patents in the same field, by creating a new patent holding company (New Wrinkle), not a manufacturer, and assigning and selling to it the patents of both parties for substantially equal amounts of stocks in the new patent holding company, violates the Anti-Trust Laws?

2. Whether the new, non-manufacturing patent holding company, New Wrinkle, Licensor, organized to prevent further litigation by offering all wrinkle patents to the whole industry, to issue to any or all manufacturers without restrictions a uniform contract of patent license under all of its present and future patents which it owned outright for a royalty of about one percent based on the sales of the Licensee, with an option to the Licensee to cancel the contract, and which license contains a provision for the fixing of the Licensee's minimum sales price for the patented subject matter by the Licensor based upon U. S. Government figures of cost of labor and materials, with the further provision the Licensee can cancel within 30 days after the announcement of the price, has violated the Anti-Trust Laws by so doing?

3. Whether, under the Anti-Trust Laws the offering by New Wrinkle, a non-manufacturer, of the same license contract, containing a stipulation that the Licensor can direct the minimum sales price of the Licensee, to any and all manufacturers without distinction on a uniform basis with full option to cancel at any time and a commitment by the Licensor not to discriminate between Licensees, is legal?

4. Whether a non-manufacturing patent owner, New Wrinkle, performing no other function except issuing licenses under its patents is within (a) the Patent Laws only and therefore not subject to the Anti-Trust Laws; and (b) whether the sole activity of issuing patent licenses is such "commerce" within the meaning of the Anti-Trust Laws to bring the simple issuing of patent licenses within those laws?

Basis of Factual Statement.

This statement is based upon the Appellant's complaint with its attached exhibits. We have based it upon the ultimate facts so pleaded, as we assume its legal conclusions and arguments are not admitted by Appellee's motion to dismiss, as otherwise no litigant would dare to make a motion to dismiss where pleadings contain more than the ultimate facts. In *Meccano, Limited, v. John Wanamaker, New York*, 253 U. S. 136, 141, 142, this Court said:

> "Petitioner maintains that its motion for final decree upon the merits should have been sustained. But the appeal was from an interlocutory order and the court could only exercise powers given by statute. On such an appeal a cause may be dismissed if it clearly appears that no ground exists for equitable

relief; but finally to decide a defendant's rights upon the mere statement of his adversary, although apparently supported by ex parte affidavits and decrees of other courts, is not within the purview of the act. He is entitled to a day in court with opportunity to set up and establish his defenses. The motion for final judgment was properly overruled. *Eagle Glass & Manufacturing Co. v. Rowe*, 245 U. S. 275, 281." (Emphasis ours.)

Principles of Previous Decrees by This Court Followed by Appellee.

We ask this Court, in reading our factual statement, based upon Appellant's pleading, to compare the actions of the Appellee and the terms of its license contract with the decrees which you have approved in patent cases involving the Anti-Trust Laws. You will find that the Appellee, as far back as 1937, when it started issuing its standard license contract, embodied exactly the features specified by this Court in later years to correct violations of the Anti-Trust Laws in connection with patent licenses, to wit:

(a) Provide a non-exclusive license contract open to any responsible manufacturer in the industry with the privilege of cancelling it at the Licensee's option.

(b) Supply technical information to the Licensees and give them the benefit of any new patents taken out by the Licensor without any increase in royalty.

(c) Establish a reasonable royalty for use of the patented subject.

(d) Omit any requirement that the Licensee give any rights under his patents to the Licensor.

(e) Eliminate cross-licenses.

(f) Eliminate control of unpatented materials.

(g) Eliminate control of any merchandizing or distribution operations of the Licensee.

(h) Insure equal treatment to all Licensees: and permit any responsible manufacturer to take the license.

(i) Preserving the right of the Licensee to take or drop the license when it pleases without reason.

(j) Insure the use of future patents without additional royalty.

Such are the provisions in Appellee's license Exhibit C attached to the complaint, a typical "one way" contract.[1]

We have added to the above, in this "one way" contract presented to the Licensee without negotiation, the right of the Licensor to fix the minimum price at which the Licensee sells the patented wrinkle finishes. There is no agreement by New Wrinkle, Inc. as to any price it might make, if it were to manufacture. New Wrinkle has never manufactured. This action is in exact accord with *E. Bement & Sons v. Harrow*, 186 U. S. 70; and *United States v. General Electric*, 272 U. S. 476.

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[1] We have adopted a convenient method of designating a contract as a "one way" contract in which a patent owner gives a License to a manufacturer and receives nothing in return except royalties; and the patent owner has the right in a "one way" contract to direct the minimum price at which the Licensee sells the patented subject matter. Such a "one way" contract will be found in *Bement v. National Harrow*, 186 U. S. 70, and *U. S. v. General Electric*, 272 U. S. 476.

On the other hand, a "two way" contract is one such as considered in *U. S. v. Gypsum*, 333 U. S. 364, *U. S. v. Line Material*, 333 U. S. 287, and *U. S. v. National Lead*, 332 U. S. 319. In the foregoing cases there was a "two way" deal by which a cross-license was effected or there was an exchange of license and patent rights with a price control in each contract so that there was a reciprocal price fixing "two way" agreement. In such cases the parties were competitive manufacturers, the price stipulated by the manufacturing Licensor was agreed would be the same as that fixed for the Licensees. *U. S. v. Gypsum*, 333 U. S. 364, 381, 382; and even non-patented subject matter was controlled.

RULE OF REASON APPLIED TO PATENT LICENSE CONTRACTS.[1]

We believe we have a solution in this contract for the problem of reconciling patent monopoly versus Anti-Trust Anti-Monopoly. By following the pattern of your decisions and decrees as a result of which we accord equal treatment to all Licensees, promote the widest possible use of the patents and accordingly dilute the patent monopoly, all in the public interest, and compensate the owner of the patent with a small royalty that becomes a substantial amount from the volume of production so encouraged.

We compensate the Licensee for the large number of competitive Licensees by stipulating the price at which he sells, based upon published U. S. Government figures as to the cost of labor and materials, thereby insuring to the manufacturing Licensee a basically sound price to induce him to manufacture at a fair profit and a fair price to the consumer to insure volume purchases by the public at a reasonable price. We protect the property in patents of the Licensor by price control of the Licensee's price to encourage widespread adoption of the license. By basing the Licensor's action on published Government figures of costs, we eliminate any possibility of collusion and agreement on prices contrary to the public interest.

New Wrinkle fixes Licensee's prices based on government figures and not based upon its own price.

This is the application of "the rule of reason" to patent licensing under the Anti-Trust Laws. The price control protects the interest of the owner of the patent in his royalties which depend for volume upon the satisfaction of the consumer with the price and quality and upon the manufacturing Licensee's satisfaction with a profitable line

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[1] *Standard Oil Co. v. United States*, 221 U. S. 1; *American Tobacco Co. v. United States*, 221 U. S. 106.

that justifies his manufacturing investment and sales efforts.

Thus the primary basis for all patents, the public interest in the widest possible use of the patents, is best served and the profit to the patent owner follows in its logical place, second to the public interest.

That is why the license Exhibit C (T. R. 13) contains the provision of this announcement of policy by New Wrinkle:—

> **"* * * it being the intent and purpose of the Licensor to open to the entire trade the use of these patents so licensed at the lowest price consistent with a reasonable profit to the manufacturer, Licensee, the trade, and to this Licensor * * *."**

It is significant that the Department of Justice, diligent as it is, made no complaint about this same reasonable contract for a period of eleven years, although widely known as being used by hundreds of companies selling millions of gallons of wrinkle finish, which created a whole new segment of American industry.

STATEMENT OF THE FACTS.

History of the Transaction.

The Chadeloid Chemical Company was a patent holding company and not a manufacturer. It had taken out patents of broad character on a new enamel which wrinkled when baked.

The Kay & Ess Company was a paint manufacturer. It had developed several very practical ways of manufacturing wrinkle finish upon which it secured patents.

Patent litigation arose between the parties where the non-manufacturer, Chadeloid, had broad patents covering the more practical developments of the paint manufacturer, Kay & Ess. This is a familiar impasse in Patent Law

which frequently results in both parties and the public losing because of the stalemate unless a way out is found—*Standard Oil v. United States*, 283 U. S. 163; *Temco v. Apco*, 275 U. S. 319, 328. (See paragraph 14 complaint in this case.) (T. R. 3.)

To overcome this impasse and make it possible for both parties to secure a return by way of patent royalties and to enable the manufacturer, Kay & Ess, to protect itself against the effect of litigation and infringement by Licensees of Chadeloid, the parties contracted to form a new company known as New Wrinkle, Inc. To this company was assigned outright all of the wrinkle patents of both parties in return for common and preferred stock in the new corporation (paragraph 16 complaint). (T. R. 3, 4.)

As Chadeloid was not a manufacturer and Kay & Ess was a manufacturer, *it is obvious they were not competitors*. Kay & Ess, however, had competitors in other manufacturers who were either Licensees of Chadeloid or infringers of wrinkle finish patents. As the co-owner of New Wrinkle, Inc. its interests were dual in extending licenses to competing manufacturers: First, to control such infringing manufacturing competitors by license to protect its business; and, second, to secure the income from New Wrinkle based upon the royalties by way of New Wrinkle's dividends. Chadeloid had its interest in securing dividends from New Wrinkle, Inc., based upon the royalty return and the elimination of litigation.

As a result Chadeloid and Kay & Ess agreed to form New Wrinkle and use the form of license, Exhibit C (T. R. 12).

Licenses like Exhibit C were offered to the entire industrial finish industry. As will appear from the exhibits, large numbers of such manufacturers competing with Kay

& Ess took licenses. New Wrinkle, Inc. became a patent holding company and did not manufacture (T. R. 2).

No claim is made here by the Government of any cross-licenses. No claim is made of controlling any unpatented materials: indeed, the contract in fixing the price at which a Licensee sold the wrinkle finishes was accompanied by certain instructions as to the basis of payment and prices on various types of wrinkle finishes. In such regulations it is *carefully specified that any materials not covered by the patents on wrinkle finishes must be excluded from any inclusion in the pricing under the patent license* (T. R. 16).

These licenses were based upon these simple principles: to grant a non-exclusive license to any paint manufacturer; and to give him a ten-year contract which he could drop at any time he pleased, upon notice. Mr. Justice Brandeis in *Standard Oil v. U. S.*, 283 U. S. 163, supported, in an opinion on behalf of this Court, this plan of an **"open end"** license to promote competition and not restrain it, saying:

> "* * * If the available advantages are open on reasonable terms to *all* manufacturers desiring to participate, *such interchange may promote rather than restrain competition.* * * *" (Emphasis ours.) (p. 171.)

There was no limit to the number of paint companies who could take the license; the price control was not the subject of a cross-license, or any agreement with the licensee. It was stated in the contract that New Wrinkle would fix the price basing it upon the U. S. Department of Labor prices of labor and upon the U. S. Department of Commerce reports of material costs. **This latter provision was to insure equal, fair treatment of the Licensees in the fixing of the price which was thus based upon public U. S.**

Government records to avoid the charge that New Wrinkle was agreeing with manufacturers on the price. As a further protection to the Licensees it was provided that in the event that the Licensee did not like the price so fixed it had 30 days in which to withdraw and cancel the license. **New Wrinkle, not a manufacturer, had no occasion to deal in fixing its own price.** This is what is known as an "open end" license "one way" contract in that anyone can have a license at any time and take it or drop it substantially at will. Hundreds of manufacturers have elected to do so since 1937 (§ 11 complaint). The patent monoply has been shared with any manufacturer.

When this offer of a license was made it was explained to various groups of paint manufacturers who were prospective Licensees and others by mail. Because manufacturers do not want to be competitively handicapped unless a relatively new product will have volume production[1] some of them stipulated that they would not take this license unless a sufficient number took the license to insure that there would be enough manufacturers who were selling and promoting this new finish to make it a worth-while business of substantially some volume, and **New Wrinkle did not want to license at the low rate of 5¢ a gallon under a non-exclusive license unless it secured volume to insure a satisfactory profit.**

In an "open end" license the public gets the benefit of widest possible manufacturing sources, plus the development work of a large number of companies in adapting the inventions to numerous uses. To insure this, the contract

[1] Contrary to popular and some legal opinions, experienced manufacturers want competition in launching a relatively new product as there is enough business for all and the sales costs and public resistance are greatly reduced by the sales efforts of multiple manufacturers.

under consideration had to treat all Licensees alike, whether large or small. It was therefore uniform to all. Secondly, there had to be a very small royalty per gallon so that it made no difference whether the manufacturer was large or small, he paid his five cents a gallon which sold for approximately $3.00 a gallon and up. (See Exhibits C and D, T. R. 12-22.) **By providing for cancellation of the contract at will the Licensee could test the validity of the patents. There was no cross-license. There was no requirement that the Licensee turn over his patents. There was no discrimination between Licensees.**

The essentials of the license are described by Appellant in paragraph 20 of the complaint as follows:

In the foregoing averment (A), "Each Licensee is licensed under New Wrinkle patents to make, use and sell wrinkle finishes;": that is the patentee's right as established by this Court.

In paragraph (B) it is provided that New Wrinkle establishes the price at which its Licensees sell. This is authorized under *E. Bement & Sons v. National Harrow*, 186 U. S. 70, and *United States v. General Electric*, 272 U. S. 476.

Under paragraph (C) the Licensee pays a royalty of 5¢ on each gallon of wrinkle sold or used. *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827.

Under paragraph (D) the prices, terms and conditions may be changed by New Wrinkle on 30 days notice and if the Licensee did not like the price he could cancel the contract, under the *Bement* and *General Electric* cases.

Such is the Government's own statement on this simple contract.

Uniformity Sign of Illegality Only in "Two Way" Contracts.

We are aware, as elsewhere discussed, that where all license contracts are the same, it has been claimed that this shows an illegal agreement; and we are aware it has also been so claimed that where a license provides that if any better terms have been given to anyone else, that the contract will be modified to give the Licensee the same terms, is inuication of illegality.

But such holdings have been in cases where competitive manufacturers cross-licensed one another with a mutual price control—a "two way" contract. Uniformity of control under such conditions has an entirely different purpose and is in effect a clear "agreement" on price. Again we say each Anti-Trust case must stand on its facts.

No manufacturer would take a license if he is not protected by these two provisions: first, if the Licensor makes better prices to a later Licensee of royalty or other terms, he must give the same treatment to the prior Licensee. It would be unfair and prevent evenhanded, free competition if this standard provision was not in the license. *This provision is the very antithesis of monopoly.* It is equally true that manufacturers will not take a license unless the licenses are all the same, with an equal chance to compete. This too, is the antithesis of monopoly and restraint of trade.

Appellant's complaint avers (para. 17) that the manufacturer, Kay & Ess, owns 51% of the common stock of New Wrinkle and 150 shares of preferred stock; and 49% of the common and 400 shares of the preferred were owned by Chadeloid. Chadeloid was not a manufacturer and was not in competition with Kay & Ess. It is not a defendant here. It was dissolved in 1945 and its assets dis-

tributed to individual stockholders (para. 5 of complaint).[1] The relationship between New Wrinkle and Kay & Ess was therefore the same as described in your opinion in *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, in referring to Hazeltine Research Inc. and its corporate affiliate.

License contract Exhibit C was offered by New Wrinkle, Inc. as a completed document for acceptance by paint manufacturers as Licensees (§§ 16, 18, 19 of complaint). As averred in the bill, a group of Licensees would not sign until enough of them would agree to do so to insure that their combined efforts in promoting this new finish would be effective. **A patented development is no better than the mass sales effort behind it.**

Despite the Government's suspicion, which the pleaded facts show to be ungrounded, the New Wrinkle contract, Exhibit C, had already been formulated before its offer to the Licensees, as the complaint indicates. The meetings of the Licensees had nothing to do with the terms of the contract. Those terms were already settled. The Licensees wanted to know what the contract meant and to be sure that enough manufacturers signed up before they were all committed for the reasons stated above. This is common sense and reasonable.

The group meetings referred to were for the purpose of explaining to prospective Licensees the terms of the contract. The completed contract, Exhibit C, was presented in the cities where the Licensees were located as there are a number of paint companies located in each of a number of prominent cities in the United States. This was a convenient method of making the explanation of the contract to groups instead of individually by mail.

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[1] This case was not filed until September 21, 1948.

This uniform contract, Exhibit C, insured that the smaller companies had the same chance of competing as the large companies and the contract insured that no special terms would be given to large companies. This is essential to unrestrained competition under a "one way" contract.

The License Contract (§20 Complaint).

Now let us look at the license contract in detail from the Appellee's point of view.

The facts of this case as set forth in the complaint in the exhibits show a simple, elementary form of **"one way"** patent license agreement open to any manufacturer to take or drop at will. It differs markedly in its simplicity and elementary character from the many cases heretofore considered by this Court involving **"two way"** contracts.

Features of the New Wrinkle License Agreement (Exhibit C).

This license agreement has the following nine provisions:

1. A non-exclusive license to make, use and sell under the New Wrinkle patents in the United States and Canada, and any additional patents without change of royalty.

2. A royalty of five cents per gallon for those wrinkle finishes covered by the patents.

3. The payment of royalty monthly with right to inspect the Licensee's records.

4. Marking of the containers, etc. with the patent notice and notice of license.

5. A license term of ten years binding only the Licensor with the provision "Licensee may, however, ter-

minate this license at any time upon three months written notice to Licensor."

6. Acknowledgment of the validity of the patents during the life of the contract.

7. Licensor reserves the right to fix prices on "products covered by patents included herein." It further provides protection for the Licensee because "* * * The Licensee may by written notice to Licensor, but only if given within such 30 day period, *elect to cancel this contract and if it does so, then said contract shall stand cancelled without any commitment or obligation by either party by reason of having entered into this contract.* * * *"

Furthermore, the license provides a second protection to the Licensee—if a price schedule is established by the Licensor it reads:

> "* * * The Licensor announces as a matter of policy that it will fix said price based upon the cost of *raw materials and labor as reported by the United States Department of Commerce and the United States Department of Labor, plus the royalty charged hereunder, it being the intent and purpose of the Licensor to open to the entire trade the use of these patents so licensed at the lowest price consistent with a reasonable profit to the manufacturer, Licensee, the trade and to this Licensor.* No schedule of Minimum Prices, Discounts and Selling Terms nor any modification or amendment or suspension thereof shall be binding upon Licensee unless at the same time and in the same terms imposed upon Licensor and all other Licensees."

8. "In the event that any subsequent license is granted with lower terms of royalty, said lower terms shall apply to the Licensee hereunder."

9. Any previous agreements between the Licensee with respect to the patents covered by the license with Licensor's predecessors in title are cancelled.

This simple contract has been granted on the same terms to hundreds of manufacturing Licensees so that all will be treated alike.

The crux of the Appellant's complaint is against the price control under paragraph 7 of the license contract. This contract (paragraph 16, T. R. 3) was completed, as pleaded by the Appellant, as a part of the settlement between Chadeloid, the non-manufacturing owner of broad patents, and Kay & Ess, the manufacturer and owner of practical patents leading to the formation of New Wrinkle, Inc., to which the respective patents were sold and assigned in exchange for stock in New Wrinkle. **Under such an arrangement any royalties paid to New Wrinkle by manufacturing Licensees would find their way** *pro rata* **to Chadeloid and Kay & Ess.** *Standard Oil v. United States*, 283 U. S. 163.

This license contract contains no agreement as to the Licensor's price and no cross-license, both of which features characterize the contracts of *"Gypsum," "Line Material"* and *"National Lead"* cases.[1] The contracts of New Wrinkle, Inc., a non-manufacturer, were all the same and were open to any responsible manufacturer in the same manner approved by this Court in *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827.

To protect the Licensee and through him the purchasing public, a safeguard was entered into (paragraph 7) which authorized the Licensor to fix the minimum price of

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[1] *U. S. v. Gypsum*, 333 U. S. 364, 400, 401, 410; *U. S. v. Line Material Co.*, 333 U. S. 287; *U. S. v. National Lead Co.*, 332 U. S. 319, 335-351.

sale by the Licensee based upon U. S. Government figures as to the cost of labor and materials. There was an option to the Licensee to cancel the contract anytime within 30 days after being notified of the establishment of the price at which he was to sell.

A second privilege was to give the Licensee the right to cancel at anytime on 3 months notice for any cause.

Thirdly, there was inserted in the contract (paragraph 7) the clause for preventing any attempt to agree with the Licensee on prices by fixing the major factors to be used in setting a price by basing them upon published United States Department of Commerce and Department of Labor figures for raw materials and labor which were the controlling factors in the setting of the price by New Wrinkle. Thus the freest competition was established, leaving the fixing of the price of the Licensee solely to the Licensor, who was not a manufacturer; and as to whom there was no possibility of an agreement as to its price because it did not make or sell anything.

The Appellant makes a point that the rule of *E. Bement & Sons v. National Harrow* and *General Electric* cases permitting price control in a simple "one way" patent license **should be denied to a non-manufacturer** on the grounds that it has no business to protect.

However, the patent owner has property in patents of the same standing as manufacturing property and derives an income from the patent property, and as such is just as worthy of protection by price control as a manufacturer's income from his manufacturing business under patents which derives its value from patents. If the choice is to be made between the non-manufacturing and the manufacturing Licensor, **it would seem logical to favor the non-manufacturing Licensor who is in no position to violate**

the law by conspiring to fix a price with the Licensee by agreement.

This contract, Exhibit C, constitutes the Licensor as the sole agent for fixing the price. The Licensor *directs* the Licensee to sell at the specified price under this contract, but does not agree with it. This is strictly a "one way" contract. It differs fundamentally from the "two way" contracts of *Gypsum, Line Material* and *National Lead* in which *competing manufacturers cross-licensed* one another with price controls which were a mere subterfuge for illegal price fixing of each manufacturer.

Paragraph 8 of the Appellee's contract guarantees to all Licensees equal treatment.

While this feature of uniformity has been construed in "two way" license contracts as being a factor in the illegal conspiracy, thereby assuring uniformity of **mutual cross pricing,** yet this argument is not a valid one in the "one way" contract of license because in such a contract it merely insures that all Licensees will be treated alike and will be on an equally competitive basis without discrimination. This feature of a standard contract, uniform in its provisions, was recently approved, when a research and patent holding organization, like New Wrinkle, Hazeltine Research, Inc., issued standard, uniform "one way" contracts of patent license, thus treating all Licensees alike. In *Automatic Radio v. Hazeltine Research, Inc.,* 339 U. S. 827, 829, 831 this Court said:

> "* * * Respondent and its corporate affiliate and predecessor have for some twenty years been engaged in research, development, engineering design and testing and consulting services in the radio field. Respondent derives income from the licensing of its patents, *its policy being to license any and all responsible manufacturers of radio apparatus* at a

royalty which for many years has been approximately one percent. * * *

"The License agreement in issue, which appears to be a *standard Hazeltine* license, was entered into by the parties in September 1942, for a term of ten years. * * *

"* * * There is present here no requirement for the purchase of any goods. Hazeltine does not even manufacture or sell goods; *it is engaged solely in research activities.* Nor is there any prohibition as to the Licensee's manufacture or sale of any type of apparatus. * * * And finally, there is no conditioning of the license grant upon the acceptance of another and different license. * * *" (Emphasis ours.)

In the last feature of paragraph 7, Exhibit C, is the following sentence. After quoting this sentence, we direct your attention to the reason why it also carries out the policy announced in paragraph 7 of equal treatment of the Licensee. It reads:

"No Schedule of Minimum Prices, Discounts and Selling Terms nor any modification or amendment or suspension thereof shall be binding upon Licensee unless at the same time and in the same terms imposed upon Licensor and all other Licensees."

The purpose of this provision was to assure the Licensee that when the price control regulations and prices were changed from time to time by the Licensor, New Wrinkle, due to the changes of costs based upon United States official reports of labor and materials, that all Licensees would equally be bound by such new schedule and that the Licensor would be bound to such equality of treatment of all Licensees and would be bound to enforce them at the same time and in the same terms imposed upon the other Licensees. The price control would be pointless un-

less the Licensor is bound by it to enforce it. It did not mean that the Licensor would observe such prices for its own manufacturing because the Licensor was not a manufacturer and has never been a manufacturer as pleaded by the Appellant (T. R. 2) where the complaint says:

> "New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1937. * * *"

The Price Fixed by the Licensor Was a Minimum; It Did Not Restrict the Licensees from Full Competition on the Great Varieties of Wrinkle Finishes Which Vary Widely in Composition, Quality and Purpose.

The license contract recognizes that the wide diversity of the wrinkle finishes by various manufacturers will result in a wide variety of prices above the minimum due to the quality, the reliability, skill in formulation and other elements which are the principal competitive factors in the sale of wrinkle finishes.

The price schedule recognized this factor and encouraged such competition for its own benefit to stimulate the widest possible adaptation of wrinkle finishes to different conditions by saying:

> "The minimum price schedule is for the purpose of maintaining a price, below which sales of the patented compositions referred to in the license contract cannot be made without a violation of the contract agreement. The purpose of this price list is not to indicate the prices at which a sale should be made. Prices at or above the minimum price schedule will naturally vary between manufacturers because of differences in manufacturing operations, character of ingredients, variation in the formulae, uniformity and quality of finished product, etc. We have fixed the minimum prices as those which would insure to any manufac-

turer a fair minimum profit and a fair price to the public, it being understood that the public would benefit from higher prices where justified by service, quality, etc." (T. R. 17.) (Emphasis ours.)

Thus New Wrinkle did nothing except direct the Licensee to observe the minimum price and positively released the Licensee to otherwise freely compete.

Uniformity of License Contracts Under the Court's Decrees.

We find good authority for uniformity in license contracts in the decrees of this Court purging and rectifying Anti-Trust violations under patent licenses by *requiring the owner of the patents to give uniform licenses of non-exclusive type to any responsible manufacturer who seeks the license at a reasonable royalty.* That is what New Wrinkle, Inc. had already done as far back as 1937, before most of your decisions on this subject.

Likewise, this Court has frequently approved the grouping of patents under a single control of either a company set up for that purpose or owned by a research patent holding company or a manufacturer. Such accumulation of patents is legal. *Standard Oil v. United States*, 283 U. S. 163; *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 834, saying "The mere accumulation of patents, no matter how many, is not in and of itself illegal. * * *"

The basing of royalties such as New Wrinkle's five cents a gallon, which is about a one percent royalty, has been approved by this Court in the foregoing case where you said "* * * **We cannot say that payment of royalties according to an agreed percentage of the Licensee's sales is unreasonable.** Sound business judgment could indicate that such payment represents the most convenient method

of fixing the business value of the privileges granted by the licensing agrement. * * *" (p. 834.) (Emphasis ours.)

There was no negotiation of the contract of Exhibit C with the prospective Licensees as the contract had already been formulated as shown in that exhibit, based upon the negotiation between Chadeloid and Kay & Ess. Exhibit C was formulated when New Wrinkle was formed. Then the license contract was offered to Licensees who would naturally ask questions as to the meaning of the terms of the contract (paragraphs 16-21 of the complaint). We do not admit, of course, the argumentative portions and legal conclusions gratuitously inserted by the pleader in these paragraphs. *Meccano, Ltd. v. John Wanamaker,* 253 U. S. 136, 141, 142.

The Government's own statement reduces the factual basis to this,—

(a) Chadeloid and Kay & Ess settled their patent litigation by assigning all their patents to New Wrinkle which was then formed and jointly owned.

(b) The License contract, Exhibit C, formed a part of this transaction.

(c) Exhibit C was offered to the trade and after the usual investigation was accepted without change of its terms as it remains today, the same contract since 1937.

REASONABLENESS OF PRICE FIXED UNDER THE LICENSE IS NOT AN ISSUE.

As one of its legal conclusions, the Appellant in paragraph 23 of the complaint entitled "Effect of the Combination and Conspiracy and the Contracts" says:

> "* * * fixing and maintaining identical and unreasonably high and arbitrary minimum prices, discounts and selling conditions and terms * * *" (T. R. 5).

We can disregard this allegation in view of the decisions of this Court that it will not go into the reasonableness of prices. *United States v. Trenton Potteries*, 273 U. S. 392, 397-8; *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 229.

INCONSISTENT POSITION OF APPELLANT ON THE FACTS.

First Inconsistency.

Appellant avers that "New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1937 * * *" (paragraph 11, T. R. 2). There is also no allegation that Chadeloid was any more than a patent holding company.

Appellant objected to our successful motion to dismiss on the ground that New Wrinkle was engaged in "commerce" such as manufacturing and selling wrinkle finishes, despite its own averment (Paragraph 11, T. R. 2) distinctly to the contrary that New Wrinkle neither made nor sold anything. **The Court accepted Appellant's pleading as correct and dismissed the case against New Wrinkle for lack of jurisdiction on the grounds that it was not a manufacturer engaging in "commerce" and that its sole activity was issuing patent licenses under the Patent Laws and thus exempt from the Anti-Trust Laws.** Consequently, the activities of issuing licenses by New Wrinkle did not come within the term "commerce" in the Anti-Trust Laws, but did come within the Patent Laws.

On the other hand, the Appellant now takes a directly opposite position in this Court that New Wrinkle is not a manufacturer or seller or is not engaged in "commerce" in wrinkle finishes (Appellant's point No. 3) and therefore New Wrinkle has no right to a price control under its

patents under the *E. Bement & Sons* and *General Electric* cases, which Appellant says are limited to manufacturers.

Either we are "in commerce" or we are not.

If New Wrinkle is not "in commerce" as a manufacturer and seller of wrinkle finishes, the decision of the Court below dismissing New Wrinkle for lack of jurisdiction under the Anti-Trust Laws should be affirmed. If jurisdiction is sustained on the ground that its activities are "commerce," then it is entitled to be sustained in its right to fix prices at which its Licensees sell under the doctrine of *E. Bement & Sons* and *General Electric* cases, under Appellant's interpretation of those cases.

Second Inconsistent Position of Appellant.

Appellant premises its case against New Wrinkle on the ground that the *Gypsum*[1] and *Line Material*[2] cases control the instant case. **In those two cases, competing manufacturers cross-license one another in a "two way" contract, each licensing the other under the respective patents of each, and each fixing the price of the other at which it would sell under the license—a clear case of competitors using the Patent Laws as a subterfuge to fix by cross-licensing both prices of both competitors at the same point.**[3]

But in the instant case Appellant avers that New Wrinkle, Inc. is not a manufacturer and is not entitled to rely upon the *E. Bement & Sons* and *General Electric* cases (paragraph 11, T. R. 2). Not being a manufacturer,

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[1] *U. S. v. Gypsum*, 333 U. S. 364, 380, 381, 382.

[2] *U. S. v. Line Material*, 333 U. S. 287.

[3] As this Court found in the *"Gypsum"* case "the Licensor agreeing that such **minimum price would be not greater than the price at which Licensor itself offered to sell.**" *U. S. v. Gypsum*, 333 U. S. 364, 381, 382. (Emphasis ours.)

it, therefore, is not a competitor of its Licensee. New Wrinkle has no reason to secure a cross-license or agree on a price for itself as it makes nothing.

Again, Appellant avers (paragraph 16, T. R. 3) that there is an outright assignment of the two groups of patents to New Wrinkle. Consequently there is no cross-license in this case, upon which to present a "two way" contract between New Wrinkle and any other company. The cross-license necessitated the retention of title in each manufacturer in the *Gypsum* and *Line Material* cases as the foundation for the "two way" contracts to fix the prices of the respective manufacturers. Chadeloid is not claimed by Appellant to be a manufacturer; it is only averred as the owner of a group of patents which it *assigned outright to New Wrinkle, Inc.*

Such transfer of title was not a cross-license and was not between competitors. It was an outright sale. The transfer of Kay & Ess to New Wrinkle was not to competitors because neither Chadeloid nor New Wrinkle were manufacturers. Hence, there was no reason for a cross-license or price fixing between competitive manufacturers as in the *Gypsum* and *Line Material* cases.

Lastly, the Appellant pleads the standard New Wrinkle contract, Exhibit C (T. R. 12), which shows on its face that it is a "one way" contract **directing, but not agreeing with the Licensee**, the price at which the Licensee is to sell. This "take it or leave it" position of New Wrinkle towards the Licensee is impressively confirmed by the provision that if the Licensee does not like this "one way" arbitrary fixing of his minimum price by New Wrinkle, he can cancel the contract and drop the whole matter.

This is in marked contrast to the "two-way" cross-license schemes of *Gypsum* and *Line Material* which would be rendered futile and pointless if one of the parties could

run out on the contract at will when the price was fixed.

The fact that New Wrinkle is not a manufacturer enables it to be perfectly independent in its "one way" direction in fixing the Licensee's price because it had no manufacturing business, as in the *Gypsum* and *Line Material* cases, to be injured by its action. New Wrinkle, Inc. was not a competitor of anybody and had no reason to fix the price for itself. That is the reason why its contract was presented as an accomplished fact to the industry to "take it or leave it."

Thus, the legal foundation, when you look at the contrasting facts in this case, as pleaded by the Appellant, in comparison with the facts of *Gypsum* and *Line Material* and *National Lead* and other similar cases, it will be seen that the facts in each Anti-Trust case are controlling and general questions cannot be decided, as sought by the Appellant, without considering the facts in each previously decided case and the facts in this case at bar.[1]

CHADELOID AND KAY & ESS NOT COMPETITORS.

Chadeloid is averred by Appellant to be only a patent owner in litigation with Kay & Ess, a manufacturer. There is no averment that Chadeloid was a manufacturer.

Therefore Chadeloid in its litigation with Kay & Ess was *a legal opponent, but not a commercial competitor.*

Appellant charges that the purpose of Chadeloid and Kay & Ess in assigning their respective patents to New Wrinkle, Inc. in settlement of the litigation in order to pro-rate the royalties from the combined patents was "in order to eliminate competition between them" (paragraph 15 complaint, T. R. 3).

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[1] *Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *Appalachian Coals, Inc., et al. v. United States*, 288 U. S. 344, 360, 361; *Sugar Institute vo United States*, 297 U. S. 553, 600.

This legal conclusion or assumption, therefore, has no fact basis. In fact, as the complaint itself shows, there is no foundation for it, as Chadeloid was not a manufacturer in competition with Kay & Ess. If it had been, we must assume Appellant would have so pleaded it.

To the contrary, the complaint avers that the only conflict between them was patent litigation; "that Chadeloid only held patents," and that conflict was resolved by the *assignment* of both groups of patents to New Wrinkle, Inc., also a non-competitor and a non-manufacturer (paragraph 14 and paragraph 16, T. R. 3-4).

Factually, therefore, this allegation in this case as a support for Appellant's claim of an illegal conspiracy between competitors is refuted by the face of the complaint itself.

WHAT IS LEFT OF THE ALLEGED CONSPIRACY CLAIMED BY APPELLANT ON THE FACTS OF THIS PARTICULAR CASE?

What does this set of facts in this case leave of Appellant's claim of illegal price fixing in restraint of trade?

First, it says the license contract of New Wrinkle, Exhibit C, was offered to the trade at various meetings etc. This we admit. **It was offered: not negotiated.**

Second, it says that the provision that the license contract would not go into effect until a substantial group of manufacturers would sign up, we also admit. No prudent manufacturer or Licensor would put itself into the position of being committed to the contract involving the manufacture and sale of a new industrial finish unless the sales resistance and sales costs would be reduced by a group of competitors all recommending, advertising and selling the same finish on a comparable basis to produce volume

business for the Licensor. At the time these contracts were signed up, New Wrinkle had not yet put into effect its price control of its Licensees.

Third, it is obvious that the price control and its particular terms were not in issue with these companies because they could cancel if they did not like it and none of them could have any control over it because New Wrinkle announced that it was basing any price it would stipulate upon the published costs of labor and materials in turn based upon United States Government Department of Labor and Department of Commerce figures. As this represented the bulk of any price of an article selling at several dollars a gallon, it would be obvious that there was no room for negotiation of price between the parties. The contract itself, as pleaded, shows that only New Wrinkle, Inc., could fix the price for the Licensor and the Appellant pleads that was the contract put into effect.

Fourth, the following is conclusive against the Appellant's charge of any alleged conspiracy to agree on price. It rests its case on the *Gypsum* and *Line Material*, etc. cases in which uniformity of price must be agreed upon by both *cross-licensing* or *cross-contract* parties or otherwise this "two way" contract in which each party in competition fixes the price for the other. **That uniformity is an essential badge of evil in a "two way" contract.**

To the contrary, in a "one way" contract such as Exhibit C in which New Wrinkle, a non-manufacturer, directs the minimum price, **uniformity of the contract becomes the badge of legality and absence of restraint of trade.** *This is because any variation between Licensees of the terms of the contract would prefer one Licensee over another and give unfair competitive advantages to one or more Licensees against the others which would be re-*

straint of trade and not an equal base for competition.

Consequently, you will see the necessity to consider the facts in this case, ignored by the Appellant in its attempted arbitrary application of the holdings of this Court without crediting the sound, factual reasons for such holdings in the "Gypsum" and other cases which do not apply to other and different facts of this case.[1]

So much for the statement of facts and their importance in this case. In the following argument we discuss the application of the law to the state of facts in this case and point out the errors of assumption upon which Appellant premises its three questions for decision by this Court: these we have restated in terms of the facts admitted here by both parties, and as averred in Appellant's own Complaint.

OUTLINE OF THE ARGUMENT.

Basic Principles Established by This Court Upon Which Appellee Relies as the Foundation for Its Argument.

I. (a) A uniform contract of license from a patent holding company, a non-manufacturer, affiliated with a manufacturing company giving uniform terms to all Licensees is legal. *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 829, 831; *Standard Oil Co. v. United States*, 283 U. S. 163.

(b) A patent owner may accumulate a large group of patents under which licenses are granted and there is

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[1] As Mr. Chief Justice Hughes said in *Sugar Institute v. United States*, 297 U. S. 553, 600:

> "We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, **each case demands a close scrutiny of its own facts.** * * *". (Emphasis ours.)

nothing *per se* illegal. *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 834; *Transparent-Wrap Machine v. Stokes and Smith Co.*, 329 U. S. 637.

(c) A combination of groups of patents that are conflicting may be placed in the hands of a single company and the income pro-rated between the former owners of their respective groups of patents. *Standard Oil v. U. S.*, 283 U. S. 163; *Temco v. Apco*, 275 U. S. 319, 328.

(d) A "one way" contract by which a patent owner licenses Licensees and fixes their price, but not his own price, is legal. *E. Bement & Sons v. National Harrow*, 186 U. S. 70; *U. S. v. General Electric*, 272 U. S. 476.

(e) A royalty based upon the amount of business done under a license is within the law. *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 834.

(f) An assignment of a patent transferring its ownership outright for a consideration is fundamentally different from a license "* * * As a license passes no interest in the monopoly, it has been described as a mere waiver of the right to sue by the patentee,* * *" *De Forest Radio v. U. S.*, 273 U. S. 236, 242.

(g) A "two way" contract consisting of a cross-license by which competitive manufacturers license each other and thereby make their respective prices uniform by price control in each license is a violation of the Anti-Trust Laws and is outside the Patent Laws. *United States v. Line Material Co.*, 333 U. S. 287; *U. S. v. Gypsum*, 333 U. S. 364, 400, 401, 410; *U. S. v. National Lead Co.*, 332 U. S. 319, 335-351.

II. The *Gypsum* and *Line Material* cases are distinguished from the *Bement* and *General Electric* cases as the former are "two way" cross-license contracts constitut-

ing an agreement to fix the prices, whereas the latter cases employ a "one way" direction from the Licensor to Licensee fixing the price at which the Licensee sells, but no agreement on the part of the Licensor to maintain the same price. New Wrinkle, a non-manufacturing Licensor, falls within the latter category. *U. S. v. Gypsum*, 333 U. S. 364, 400, 401, 410; *U. S. v. Line Material*, 333 U. S. 287; *U. S. v. General Electric*, 272 U. S. 476.

III. New Wrinkle established its contract, Exhibit C, and offered it under the patents it owned without discrimination on equal terms to any manufacturer. **It did not fix its own price because it was not a manufacturer as it had nothing to sell on which to fix a price.** Therefore, there was nothing upon which it needed any negotiation with the Licensee. New Wrinkle's contract comes within the *Bement* and *General Electric* "one way" cases. Its contract is even more remote from any Anti-Trust violation because it had no manufacturing to price and protect by price. *Bement v. National Harrow*, 186 U. S. 70; *U. S. v. General Electric*, 272 U. S. 476. (Appellant's question No. 1.)

IV. The terms of the license contract govern its legality. The origin of the contract was in the settlement of the litigation between a non-manufacturer and a manufacturer by assignment of the entire interest in the two groups of patents to the non-manufacturer, New Wrinkle, Inc. **The uniformity of the agreements offered in a "one way" contract of the "Bement" and "General Electric" type was proof of legality as the contract did not discriminate between Licensees: the uniformity in a "one way" contract is used to prevent discrimination and restraint of trade, while the use of uniformity in the "two way" contract is indicative of an illegal plan to fix prices because uniformity**

is the foundation of such illegal, mutual price fixing action. *U. S. v. Gypsum*, 333 U. S. 364; *U. S. v. Line Material*, 333 U. S. 287; *U. S. v. National Lead*, 332 U. S. 319. The law encourages the widest possible use of patents in the public interest "to promote the progress of science and useful arts." *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corporation*, 340 U. S. 147. (Appellant's question No. 2.)

V. The fact that New Wrinkle, Inc. is a non-manufacturer does not deprive it of protecting its income from its patents under the doctrine of *Bement* and *General Electric* cases as the right to do so depends upon the protecting of the patent property *whether from royalty income or manufacturing*, and not upon the protection of mere commercial manufacturing rights. Additionally, there is far less danger of violating the Anti-Trust Laws by permitting a non-manufacturer to fix the price of his licensee under his patents because he is under no temptation to fix them to protect his own price structure. *Bement v. National Harrow*, 186 U. S. 70; *U. S. v. General Electric*, 272 U. S. 476. (Appellant's question No. 3.)

VI. There is no jurisdiction over New Wrinkle's license activities under the Anti-Trust Laws. First, New Wrinkle is not engaged in "commerce" because it does not manufacture or sell anything. It executes patent licenses only which are not "commerce" under the Anti-Trust Laws. Second, there is no jurisdiction because its activity is solely under the exemption of the Patent Laws. The Appellant's third question emphasizes that it claims New Wrinkle is not engaged in manufacturing or selling and therefore has nothing to protect in "commerce" and for that reason is not entitled to fix the price of its Licensee under the *Bement* and *General Electric* cases, which shows

that (a) New Wrinkle is not engaged in "commerce"; and (b) it is exempt from the Anti-Trust Laws because all it does is to function within the exemption from those laws of the Patent Laws. *United States v. Joint Traffic Assn.*, 171 U. S. 505, 567, 568, 573; *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604; *U. S. v. Yellow Cab Co.*, 332 U. S. 218, 230; *Apex Hosiery v. Leader*, 310 U. S. 469.

ARGUMENT.

POINT I.

GENERAL PRINCIPLES ESTABLISHED BY THIS COURT UPON WHICH APPELLEE RELIES.

New Wrinkle Has the Legal Right to Grant Uniform License Contracts to All Manufacturers Alike.

It has been traditional for patent holding companies to offer uniform contracts of patent license to manufacturers who are competitive. This was again recently recognized by this Court in *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 829, where this whole problem of licensing under patents was reviewed. This Court said:

> "* * * Respondent and its corporate affiliate and predecessor have for some twenty years been engaged in research, development, engineering design and testing and consulting services in the radio field. Respondent derives income from licensing of its patents, *its policy being to license any and all responsible manufacturers of radio apparatus at a royalty rate which for many years has been approximately one percent.* * * * The license agreement in issue, which appears to be *a standard Hazeltine license*, was entered into by the parties in September 1942, for a term of ten years. * * * " (Emphasis ours.)

The Terms of the New Wrinkle Contract Are Those Approved by This Court.

As in this case "Hazeltine does not even manufacture or sell goods; it is engaged solely in research activities." (page 831) and as in this case "there is no conditioning of the license grant upon the acceptance of another and different license" (page 831). This Court again called attention to the fact that the mere accumulation of patents, no matter how many, is not and of itself illegal. (See *Transparent-Wrap Machine Corp. v. Stokes and Smith Co.*, 329 U. S. 637.) And as to royalty based upon a percentage of the Licensee's sales this Court held "We hold that in licensing the use of patents to one engaged in a related enterprise, it is not *per se* a misuse of patents to measure the consideration by a percentage of the Licensee's sales." *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 834.

New Wrinkle's Unusual Licensing Plan Discourages Restraint of Trade.

The logical and common sense way of reducing monopoly and decreasing restraint of trade was aptly stated by Mr. Justice Brandeis in *Standard Oil v. U. S.*, 283 U. S. 163:

> "If the available advantages are open on reasonable terms to all manufacturers desiring to participate, *such interchange may promote rather than restrain competition.*" (Emphasis ours.) (p. 171.)

And so this Court held that when the parties were trying to settle conflicting claims in litigation, to defeat their objective *there must be a definite showing of illegality*. That, we submit, has not been shown in this case—suspicion is an insufficient support for doing of justice.

The Settlement of Patent Litigation to Open All Patents to an Entire Industry Is Lawful.

In *Standard Oil v. U. S.*, 283 U. S. 163, a conflict had developed between four companies concerning the validity, scope and ownership of patents on the process of "cracking" gasoline.

> "* * * One infringement suit was begun; cross-notice of infringement, antecedent to other suits, were given; and interferences were declared on pending applications in the Patent Office." (page 168.)

These difficulties led to the execution of agreements cross-licensing the patents and providing for a division of royalties from Licensees. The Government brought suit under the Sherman Act, but this Court said:

> "* * * Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the Act. * * *" (page 171.)

In *Temco Electric Motor Co. v. Apco Mfg. Co.*, 275 U. S. 319, 328, an opinion by Mr. Chief Justice Taft, discussed this problem, recognizing the need for the Courts to encourage some adjustment of conflicting rights under patents. This is the same *Temco* case cited in *U. S. v. Line Material Co.*, 333 U. S. 287, 291.

The Absence of Cross-Licensing in New Wrinkle Contract is a Badge of Legality.

This Court has drawn the distinction between the "one way" contract of the *General Electric* case as contrasted with the "two way" cross-license scheme of *Gypsum* and *Line Material*. In the latter case Mr. Justice Reed said:

> "* * * While the *General Electric* case holds th .t a patentee may, under certain conditions, lawfully control

the price the Licensee of his several patents may charge for the patented device, no case of this Court has construed the patent and anti-monopoly statutes to permit separate owners of separate patents *by cross-license or other arrangements to fix the prices to be charged by them and their Licensee* **for their respective products.** Where *two or more patentees with competitive,* non-infringing patents combine them and fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for his Licensees. The struggle for profit is less acute. * * * " (Emphasis ours.) (p. 311.)

An assignment of a patent, transferring its ownership outright, for a consideration is fundamentally different from a license "As a license passes no interest in the monopoly, it has been described as a mere waiver of the right to sue by the patentee,". Quoted with approval by Mr. Chief Justice Taft for a unanimous Court in *De Forest Co. v. United States,* 273 U. S. 236, 242. In the *Line Material, Gypsum* and *National Lead* cases we had cross-licenses between manufacturers who were competitors which developed a situation that frequently violates the Anti-Trust Law.

POINT II.

THE "ONE WAY" CONTRACT OF GENERAL ELECTRIC CONTRASTED WITH THE "TWO WAY" CONTRACT OF GYPSUM AND LINE MATERIAL.

New Wrinkle and Chadeloid Were Not Manufacturers; and Not Competitors of Kay and Ess.

The Appellant relies upon support of the *Gypsum* and *Line Material* cases in its Number 1 question. Here again, the difference of the facts and the circumstances of the parties spell the difference between the legal *General Electric* method and illegal *Gypsum* and *Line Material* method of doing business.

Let us look at the facts of the New Wrinkle case. Chadeloid was a mere patent holding company; it is not averred to have been a manufacturer and therefore not a competitor of Kay & Ess who was a manufacturer. These two non-competitors but *opponents in patent litigation*, formed New Wrinkle, which is also a patent holding company and not a manufacturing company. The acquisition of the patents by New Wrinkle was by absolute assignment for its stock.[1] There were no cross-licenses and there was no occasion for the cross-licensing because Chadeloid and New Wrinkle were not manufacturing.

New Wrinkle's Only Objective: Royalty Income From Patents.

As New Wrinkle had no objective to gain but income from the patents and in order to do so it wanted to protect its property rights to get the most royalty from the largest number of Licensees who were competitors. It therefore adopted a simple license like that of "*General Electric*,"

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[1] The legality of an assignment of a patent for any valuable consideration has been upheld by this Court. *Transparent-Wrap Machine Corp. v. Stokes Co.*, 329 U. S. 637.

a "one way" contract, by which it told the Licensee the price below which it could not sell. New Wrinkle did not agree with the Licensee—there was no occasion to do so.

New Wrinkle's Interest Was Patent Royalties: Not Price Fixing for Itself.

It is significant that New Wrinkle received nothing from the Licensee except his money. The amount of money New Wrinkle receives depends upon how much the Licensee sold. The extent to which the Licensee can afford to push its sales depends upon first, whether its operation is profitable; and, second, whether its price is the lowest possible, consistent with profit, in order to get the maximum sales.

New Wrinkle's interest is likewise protected by having a minimum price control which will enable the Licensee to accomplish the foregoing objectives and produce the maximum royalties.

Uniformity of License Contract Only Important When Cross-Licenses: Then it Becomes a Matter to Determine Illegality.

There is no need for a cross-license or price fixing agreement for New Wrinkle had no manufacturer's rights to protect by such a scheme. That is why the license contract contains no reference to reciprocal grants under the Licensee's patents as in *U. S. v. Gypsum*, 340 U. S. 76, 78, 93, 94. In this *Gypsum* case the Court prohibited reciprocal grants. It is for the same reason that uniformity of contract means in the *General Electric* and *New Wrinkle* cases evenhanded competition; but in the *Gypsum* and *Line Material* cases it was the heart of the conspiracy *because, unless the contracts were uniform, the conspiracy would fail in its objective of uniform, reciprocal prices.*

POINT III.

THE WRINKLE CONTRACT CONTROLS ITS OPERATION.

New Wrinkle Uses a "One Way" Contract; Its Sole Link With Its Licensee Manufacturer Was Its License.

The Wrinkle contract is legal *per se* under the doctrine of the *General Electric* case. According to Appellant's allegations, as we understand them, it was drafted and then offered to the industry. Even if it had not been first drafted, but had been the subject of negotiation with the Licensees, and then drafted, the situation would have been no different because there is no violation of law in negotiating a legal agreement.

As a matter of fact, there was nothing that needed negotiation with the Licensee. New Wrinkle was only securing a small royalty and had the privilege of specifying the minimum price. The Licensee, on the other hand, entered into no contract by which it gave away any property to New Wrinkle. It could cancel the contract any time it pleased; it secured only a non-exclusive license. **It gave no cross-license or patent rights to New Wrinkle; it had no business relationship with New Wrinkle because New Wrinkle was not a manufacturer and had nothing in common with the Licensee.**

In the *Gypsum* and *Line Material* cases the situation was far different. Each party wanted something from the other of commercial, competitive nature to soften the rigors of competition which the parties sought to suppress by using uniform contracts to secure uniform prices. Additionally the parties endeavored to control the organization of the industry and unpatented materials. No such conditions exist in this case.

The absence of manufacturing by New Wrinkle is a badge of legality: this case is further from monopoly than the "General Electric" case.

In the *General Electric* case, General Electric fixed the price of the Licensee, as we understand it, at the price at which General Electric was going to sell. Certainly that was the case in *United States v. Gypsum Company*, relied upon by the appellant, for this Court said:

> "As in the previous contracts, United States v. Gypsum reserved the right to fix the minimum price at which each licensee sold wallboard embodying the licensor's patents, *the licensor agreeing that such minimum price would not be greater than the price at which the licensor itself offered to sell.*"

There is no such provision in the Wrinkle Contract. There was no need for it, because Wrinkle was not a manufacturer. There is nothing in the Wrinkle Contract that refers to New Wrinkle's price action because there was none.

Thus, the New Wrinkle Contract is even more remote from the Anti-Trust Laws than the General Electric contract and, of course, the Gypsum contract in view of the absence of any agreement with the licensee as to the licensor's price, either as a guide, a limitation or as a matter of identity by agreement. The very issue of Anti-Trust violation by price fixing which was the heart of the *General Electric* and *Gypsum, Line Material*, etc., cases is absent from the New Wrinkle Contract.

Absence of New Wrinkle's Commercial Intent in Manufacturing is a Guarantee of Its Disinterest in Mutual Price Control.

New Wrinkle's price control had no bearing upon its operations outside of the patents, because it had no property or business except in the patents.

When you examine the difference in facts, you will perceive the misleading character of the phrasing of

Appellant's question number 1, because it ignores the fact of the complete absence of a manufacturing Licensor—there was no motive or foundation for a "two way" contract. Appellant tries to fit the New Wrinkle case with different facts into a rigid pattern of an entirely different type, just because the Appellant finds what it believes are some helpful statements made by this Court when this Court was referring to an entirely different set of facts.

The Appellant looks at the form of words and not to the substance of the transaction as required in Anti-Trust cases.[1]

POINT IV.

THE TERMS OF THE LICENSE CONTRACT GOVERN ITS LEGALITY: THE BACKGROUND OF FACTS DEMONSTRATE ITS FULL COMPLIANCE WITH THE ANTI-TRUST LAWS.

New Wrinkle's Objective Was the Maximum Enjoyment of the Patent Grant: It Had No Interest in "Commerce."

These features of the New Wrinkle contract demonstrate on its face that its purpose and its result was to secure the maximum enjoyment of the patent grant without stepping outside of the Patent Law.

If there is to be a monopoly of sound patents, then the greater the dilution by licensing with the maximum number of Licensees, the greater the patent serves the public interest. *Great A. & P. Tea Company v. Supermarket*, 340 U. S. 147.

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[1] *Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *Appalachian Coals, Inc., et al. v. United States*, 288 U. S. 344, 360, 361; *Sugar Institute v. United States*, 297 U. S. 553, 600.

New Wrinkle's License Devoted Solely to Patent Matters.

First, it owned the patents. Second, by owning outright all of the important patents in this industry on wrinkle finishes, *it could give to the Licensee immunity from patent litigation which would encourage the Licensee to make the necessary investments in laboratories, plants and equipment to manufacture wrinkle finishes.* Third, the Licensee secured immunity from all future patents of New Wrinkle without any increase in royalty. Fourth, the Licensee did not give up its liberty of action as it could retire from the contract because it could get out of it at will, if it desired to compete without reference to the contract and its patents. Its acknowledgment of the validity of the patents terminated when it dropped the contract. Lastly, it was protected in the price fixing of the minimum price by first knowing what the price was before being committed; then having the assurance that the price was not arbitrary because it was based upon Government figures to insure normal costs of operations without loss; and then it could cancel before the price control could go into effect; or upon three months notice after it went into effect; and finally, if the royalty was changed, the Licensees would be treated fairly by having the same terms.

New Wrinkle License Based Upon the Form of License Approved in Decrees by This Court.

A study of this Court's decisions involving decrees in Anti-Trust—Patent cases shows that the basic principles for operation under patents you have laid down in your decisions have been followed in this license—non-exclusive license to any manufacturer, subject to cancellation by the Licensee at any time; and to this we have added a Licensor who is not a competitor manufacturer so any minimum

price for Licensee fixed by the Licensor could not possibly be a conspiracy as the Licensor had no price to make for its own goods.

The Chadeloid-Kay and Ess-New Wrinkle Settlement Was Based Solely on Patent Royalty Income.

This contract also contains, in its price fixing provision in paragraph 7 means of preventing a company from conspiring on prices for commercial competitive purposes because price is based upon economic conditions of cost of labor and materials in published Government figures.

You will note that Chadeloid, not a manufacturer, but a patent holder, was only interested in patents and income from patents. When it settled the litigation, it secured the larger portion of the stock from which it would get the major share of dividends from royalties. New Wrinkle, Inc. was patterned upon Chadeloid's method of doing business, where the primary interest was in patents and not in manufacturing.

Kay & Ess, the manufacturer, had to take a license from New Wrinkle as it was required to pay royalties from which Chadeloid got its major share. *Royalties were Chadeloid's sole interest.* Kay & Ess took New Wrinkle's license like anyone else so that all manufacturing Licensees would be on the same basis, and Chadeloid would get its share of New Wrinkle royalties.

Appellant Disregards the Critical Factual Differences Between Its Authorities and the Facts of This Case.

If you refer to the second question presented by the Appellant you will note again an effort to avoid a consideration of the *controlling facts which are omitted also from the second question.* Appellant seeks support for its expected answer, by so framing its question, from *United*

States v. Line Material, 333 U. S. 287 and *United States v. Gypsum*, 333 U. S. 364. Its position is that this Court held that the Patent Law does not sanction licensing by two patent owners, one a non-manufacturer, who have assigned their patents outright to a jointly owned non-manufacturing company under an arrangement giving to the new company, the new patent owner, the authority to grant price fixing licenses under the patents of both.

But that was not what this Court held in *Line Material* because that statement omits the critical facts which are the difference between illegality and legality. In the *Line Material* case two manufacturers not only cross-licensed one another, but **conspired to agree upon the price** *because both were manufacturers each attempting to take care of their commercial businesses under the guise of patent licensing.* There is no such reciprocity between Chadeloid and Kay & Ess as Chadeloid was not a manufacturer and therefore there was no such cross-licensing.

Kay and Ess was Forced to Take a Standard License so Chadeloid Could Get the Major Share of its Royalties.

The formation of New Wrinkle took the power from Kay & Ess to do what it pleased. Chadeloid, the non-competitor and non-manufacturer, **could put the brakes on Kay and Ess' liberty of action under its own patents so assigned to New Wrinkle.** Chadeloid had the largest stock and financial interest at stake.

As a part of the settlement Chadeloid required Kay & Ess to pay royalties to New Wrinkle so that it would secure its share of New Wrinkle's operations in compensation for turning over its broad patents to New Wrinkle. That is why Kay & Ess had to take a license from New Wrinkle like anybody else. The large interest of Chadeloid

in New Wrinkle, the major financial interest, demanded such impartial action by New Wrinkle so it could get Kay & Ess royalties.

Thus the Appellant's effort to say that there is no difference between *Line Material* and this case in the absence of cross-licensing must fail because the basic feature of *Line Material* was the price fixing agreement between *two competitive manufacturers* in a "two way" *cross-license* contract which they *both* used as a basis for their own and the rest of the industry combining illegally by mutuality of reciprocal price fixing.

Appellant rests its case on the proposition that a Licensor must be a manufacturer to have price control.

May we suggest this: if this Court upholds the Appellant's position that only a manufacturer ~~can have~~ a legal patent price control, **then the only way we can purge ourselves would be to go into manufacturing. Such a condition in a decree we submit would not be proper.**

POINT V.

THE FACT THAT NEW WRINKLE IS NOT A MANUFACTURER DOES NOT DEPRIVE IT OF THE RIGHT TO FIX THE PRICE FOR ITS LICENSEES UNDER THE GENERAL ELECTRIC CASE.

The Basic Principle of the General Electric Case is that a Patent Owner Can Protect His Income from Patents, Whether Manufacturing or Royalty Income, by Fixing His Licensee's Minimum Price.

This question is that raised in question No. 3 of the Appellant. Appellant is referring to the language of this Court in the *General Electric* case, 272 U. S. 476, 490, which says the right of a patentee to fix the minimum price of its Licensee is because "the price at which his Licensee

will sell will necessarily affect the price at which he [Licensor] can sell his own patented goods."

Stated another way, a patentee has the right to protect his patents, his income from his patents and his business under patents, by fixing the Licensee's minimum price. *In principle, there is no distinction.*

With that rule we have no quarrel, as we claim the right to fix the Licensee's price for exactly that reason, namely, New Wrinkle has grave property interests in this large group of patents from which it derives substantial royalty income (its only income) that will be affected if the Licensees sell at such low prices, that the Licensees would not profit due to the unlimited opening of the patents to the competition of everybody. That would necessarily affect their volume of sales, then the volume of royalties and their lack of business which would in turn injure the return of royalties to New Wrinkle.

In principle, there is no difference whether a Patentee is protecting his patent right under which he is manufacturing or protecting income from his patent rights under which he is licensing. Both situations come within the principle established by this Court in the *General Electric* case that the Patentee-Licensor has the right to fix his Licensee's price to protect his business under his patents.

The Appellant itself pleads that the Appellee's royalty of five cents a gallon on millions of dollars of sales is substantial (T. R. 2, paragraphs 10 and 11). This brings this case within the rule stated in the *General Electric* case—in order not to violate the Sherman Act, the royalty must be **"normally and reasonably adopted to secure pecuniary reward for the Patentee's monopoly."** *U. S. v. General Electric*, 272 U. S. 476, 490. (Emphasis ours.)

Appellant's Position that the "General Electric Case" Only Applies to Manufacturing Patentees Is Unsound in Law.

We might add that the Appellant's position is also unique in that it means, if it is correct, that only those owners of patents who have enough money to go into business to manufacture could enjoy this valuable right of controlling the price of the Licensee.

We have never, as yet, in the United States, made the size of a man's pocketbook a condition for enjoying his legal rights under the Patent Law. It is unusual that the Government of the United States would take such a position when its duty under the Anti-Trust Laws is to enforce them to give us equality of competition between men of different means; and not preferences in competition according to the size of the pocketbook of the competitors. This Court has never made such a distinction. This illustrates the unsound position of the Appellant in this matter. So much for the third and last question of the Appellant.

There Has Been No Conspiracy to Unreasonably Restrain Commerce.

No Licensee has been restrained or forced to take a license contract—its terms provide that the Licensee can take it or leave it at will.

No manufacturer and no sale is unreasonably restrained by the mere fixing of the Licensee's price by the Licensor—this Court has so said.

There is no conspiracy to restrict trade in Wrinkle finishes because there has been only an open agreement by Chadeloid, the non-manufacturer, and Kay and Ess, the manufacturer, to settle their litigation by combining

patents and agreeing that the new holding company should license the industry in a "one way" license, open to anyone, with equal treatment to all.

There is no proof of conspiracy just because New Wrinkle, a non-manufacturer, with no price of its own to be fixed, has offered to a group of manufacturers a single, uniform license contract with sole power to direct a minimum price by the Licensee.

No agreement to unreasonably restrain between the Licensor and the Licensee has been shown by any factual averment—*all there is are mere legal conclusions and suspicions without factual support.*

To the contrary, the facts pleaded by the complaint positively rebut any conspiracy to restrain trade unreasonably because of the fact that New Wrinkle was not a manufacturer. It, therefore, did not even have any basis for fixing a price based upon its own manufacturer as in the *General Electric* and other cases. Again, New Wrinkle had no reason to fix a price to protect a manufacturing business. The only reason for New Wrinkle to fix the lowest possible price consistent with the dilution of its monopoly in order to insure that its Licensees would operate profitably, but at the lowest possible price to insure the maximum of sales. There was no agreement on price of a Licensor to fix prices for the Licensees the same as it was making for itself.

Still again there is a positive prohibition of conspiracy because, instead of using a manufacturer-licensor's own price as a standard of fixing the Licensee's price, in this case the non-manufacturer, New Wrinkle, announced that it would use the Government figures on costs and labor materials which were the predominant factors in fixing the price and which Government figures were independently arrived at by the United States Government and impos-

sible of being changed by any conspiracy between the Licensor and Licensee.

Therefore, not only do we have in this case the absence of the factors of conspiracy, but we have the positive safe-guards based upon the fact against any conspiracy to reasonably restrain trade being effectuated.

This leaves us with a complaint with its admitted facts, in which nothing is factually pleaded to support a scheme to unreasonably restrain. This leaves Appellant's unadmitted suspicions and legal conclusions completely devoid of any factual allegations to support them.

REBUTTAL TO GOVERNMENT'S ARGUMENT.

In the "Statement of Facts" and elsewhere, the Appellant's brief persists in assuming that an allegation by it of its conclusion that there is a conspiracy was admitted as a fact by our motion to dismiss. This is not so as no such admission was made on the argumentative conclusions of the Appellee. The Appellant seeks to prejudice this case by such typical references as "the conspiracy," "the co-conspirators have been engaged in a conspiracy," "pooling of patents to eliminate competition between themselves," etc., at pages 4, 5 and elsewhere throughout the brief.

It seems to us the legal interpretation of the admitted facts can be safely left to this Court and no such admissions as to legal conclusions will be implied in a motion to dismiss. *Meccano, Limited v. John Wanamaker*, 253 U. S. 136, 141, 142.

The Appellant first assumes a conspiracy to restrain interstate commerce as a fact: and then argues "Participation in such a conspiracy is therefore a violation of the section irrespective of whether the conspiring party is en-

gaged in the interstate trade subjected to restraint or in any interstate trade" (p. 15 Appellant's brief), ignoring:

1. That the exercise of the legitimate right under the Patent Law to license under patents with a price control is exempted from the foregoing rule so long as the Appellee does not step outside of the Patent Law.

2. The Appellant does not charge New Wrinkle has done otherwise than license with a patent control—so where is the conspiracy? Certainly the offering of legal patent licenses already fixed as to terms before the license fee is approached is not a conspiracy—it's only the exercise of a legal right.

3. Patent licensing with a price control has been held by this Court as coming within the Patent Laws and, therefore, not within the Anti-Trust Laws.

4. Such patent licensing is not "commerce" within the meaning of the Anti-Trust Statute. If we step outside of the patent licenses and use it to control other matters, then only does the issue of "commerce" and conspiracy arise.

The Appellant admits this Court has held "this restriction on the licensee's sales price comes within the implied terms of the patent grant. *United States v. General Electric Co.*, 272 U. S. 476. The ground of decision was that this limitation is 'normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly,' in that it enables the patentee to obtain as a reward the return coming from multiple exploitation of the exclusive rights conferred by his patent, without impairing his opportunity to obtain the reward which comes from selling the patented product himself at whatever

price he thinks will bring the greatest return. 272 U. S. 476, 489-490." (pp. 16, 17 Government brief.)

Now, where does the Appellant say that New Wrinkle departs from that rule and the conspiracy begins? It says "Price fixing is the core of the conspiracy alleged in the complaint" (p. 20), but this Court has said that this in itself, without more, is legal under the Patent Laws.

What more did Chadeloid, a non-manufacturer and owner of basic patents, do with Kay & Ess, the manufacturer, with "practical" patents?

These non-competitors assigned the patents to a non-manufacturing patent owning company, New Wrinkle. They agreed to a form of usual non-exclusive universal license. Kay & Ess, the manufacturer, required protection in its manufacturing and sales for this widespread licensing of its patents pursuant to the decision of this Court. Therefore, a price control was put in the license to protect the Kay & Ess manufacturing interests and Chadeloid's interests in getting royalty.

Was it an illegal conspiracy outside of the Patent Laws for Kay & Ess to make this requirement? This Court in the *General Electric* case has said "no." Was it a conspiracy to offer such a pre-arranged universal license to all comers alike? This Court has said "no" in *Automatic Radio v. Hazeltine Research, Inc.*, 339 U. S. 827, 829, 831.

Can it be, as Appellant charges (bottom of p. 20, top of p. 21, Government brief), that it is an illegal conspiracy to approach prospective licensees with a contract already fixed in its terms of patent license with a price control practice. A mere offering to license under what this Court has said is a legal contract cannot be an illegal conspiracy.

The offering of such a license at a low royalty rate which requires the volume of many producers to make a satisfactory return can certainly be made if there are

enough manufacturers taking it to make the dilution of the monopoly worth-while at such rates. Can this reasonable precaution be challenged by the legal conspiracy question? We think not.

Can the offering to all manufacturing such a contract to take or leave as they please be an illegal conspiracy? Where there is no agreement by the Licensor to fix reciprocal, "two way" prices we think not. New Wrinkle was not a manufacturer nor was Chadeloid.

Now, Appellant finds itself in its brief in a serious conflict of positions. it finds in its Point II "The fact that in this case price limitation is incorporated in license agreements made by a patentee who did not make or sell the patented product makes the doctrine of the *General Electric* case inapplicable." (p. 13 Government brief.)

But on pages 21, 22, it takes the position that New Wrinkle reserves the right to manufacture and, therefore, **should be treated as a manufacturer** who licenses and will also adhere to the same price so fixed by it. From that statement the Appellant bases its whole argument of conspiracy.

Obviously, if New Wrinkle is to be given the status of a manufacturer, Appellant's position under its Point II that New Wrinkle's conduct is not justified must fall under the *General Electric* case. And, certainly, the Appellant's Point I must fail because it states "New Wrinkle has never undertaken to make or sell wrinkle finishes." (p. 22 Government brief.) Therefore, it had no price of its own to protect and during its life of fourteen years has had none—therefore, there is **no fact foundation for a conspiracy to illegally agree on prices.** Point II recognizes this as the Appellant's basic problem when it tries to show that New Wrinkle, a non-manufacturer, is not entitled to the *General Electric* case because of that fact.

The fact is New Wrinkle is not a manufacturer and has never been. It has had no price of its own on commercial operations to protect.

The question raised by Point I is moot. No facts are pleaded to raise the issue. As the facts have stood for fourteen years New Wrinkle is not a manufacturer and its license contract is a "one way," *General Electric* type of contract of patent license.

However, if this Court finds that New Wrinkle does have the status of a manufacturer, Point II of Appellant fails (p. 25). In such an event if the Court so finds, the answer to Appellant's claim in Point I that Wrinkle agrees that, if it ever did manufacture, it would observe the minimum prices of the Licensee is this:

The retaining of such a right in the New Wrinkle license contract as a manufacturer-patentee is legal under the doctrine of this Court that "When the patentee licenses another to make and vend, and **retains the right to continue to make and vend on his own account, the price at which his licensees will sell will necessarily affect the price at which he can sell his own goods** (*General Electric Company* case).

The retention of the right by a patent owner to sell at an established licensee price, in the event of manufacturing, has, therefore, been approved by this Court as coming within the Patent Law. Here again this point fails by the Appellant's own citation (p. 26) of the above case.

Before leaving Appellant's Point I, better say briefly that New Wrinkle regulations cover only those prices necessary to be of equal treatment to all licensees because of the varying types of wrinkle finishes into which various colors and other characteristics are incorporated under the various patents—such finishes are not a single ended

product. There is no attempt to control the commercial businesses of the licensee outside the patents. The provisions are to prevent the licensee cheating on his price under the patent.

Appellant cites *United States v. Vehicular Parking, Ltd.*, 54 F. Supp. 828, to the effect that the *General Electric* case does not apply to a patent holding company independent of competitive manufacturers. The facts of the *Vehicular* case, however, show that the holding company was merely a combination of competitive manufacturers who joined together to control under their patents, by a system of licenses, the industry, both patented and unpatented. These were competitive manufacturers who thus established by their licenses a "two way" contract and fixed the prices by such means by agreement.

This is wholly different from the instant case where the non-manufacturing Chadeloid dealt with Kay & Ess, the manufacturer, to settle litigation which had already arisen. There was no contract between competitive manufacturers as Chadeloid was not a manufacturer. All that was done was to open up to anyone the Wrinkle patents with a price control. The *Vehicular* case is squarely within the class of such cases as *Masonite*, *Line Material* and *Gypsum* and does not support the Appellant's claim that patent holding companies are *per se* in violation of the law.

Point III charges conspiracy based upon a partial statement of the facts in this case. Appellant's brief (p. 29) says: "As a result of the negotiations, the two patent owners entered into a contract which provided for organizing New Wrinkle, assigning their patents to it, and the granting by it of price-fixing licenses under these patents (par. 16, R. 3-4)."

The Appellant fails to state this was a patent impassé case between the non-manufacturer, Chadeloid, and the

manufacturer, Kay & Ess, who were forced to such a solution in order to open all patents to use from which the parties could derive royalties pro rata. Such a solution was approved by this Court in *Standard Oil v. United States*, 283 U. S. 163.

"We submit that a combination thus to use the patents of two patent owners for the purpose of price fixing is beyond the scope of the monopoly" says the Appellant in its brief. Here again the Appellant states a generality hoping to come within the "two way" contract of *Line Material* and *Gypsum*. It ignores the fact that those cases were between two or more manufacturers who wished to fix their respective prices by illegal agreement, control unpatented materials, etc.

Here, to the contrary, one non-manufacturer and a manufacturer were endeavoring to secure a reward from their patents "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." *United States v. General Electric Co.*, 272 U. S. 476, 490.

There was no agreement "to enhance the value of his own trade agreement by eliminating or impairing competition" because the purpose was to open to all for competition. The price control did not affect either Chadeloid or New Wrinkle, who did not manufacture. The price control was essential to the full enjoyment of the patents thus consolidated so they could be enjoyed by all other manufacturers. Kay & Ess became just another licensee. Its percentage of royalties was its purely patent compensation.

This set of facts is far different from the conditions in the *"Masonite"* and other cases that sought to use the patents as a vehicle of a "two way" agreement where the primary purpose was commercial organization of an industry, patented and unpatented. There is no cross-license between manufacturers here as in *Line Material*, *Gypsum*,

etc., as a subterfuge for "two way" price fixing between manufacturers. This case at bar differs fundamentally from *Standard Sanitary vs. United States*, 226 U. S. 20, because the subterfuge there was a weak patent situation assigned to a trade association owned, controlled and dominated by all the licensees—a mere subterfuge or illegal agreement.

New Wrinkle is not owned and dominated by a group of licensees.

Appellant suggests that we change the facts (its brief p. 32), and assume that Kay & Ess and Chadeloid have cross-licensed one another and one of them as the agent for the other granted to the licensee licenses, ignores the fundamental facts in this case.

First, Chadeloid was not a manufacturer and cross-licensing it was of no particular interest to it. It had nothing under which the cross-license would have been of any value.

Second, this suggestion incorporates the illegal feature of two competitive manufacturers (non-existent here) entering into a "two way" contract by agreement on prices under the subterfuge of patents to protect their respective manufacturing interests.

Third, it incorporates continuing ownership by the respective parties by cross-licensing which is not in this case.

This is not a question of New Wrinkle doing individually what the parties could not do directly. To the contrary, if Kay & Ess had bought the patents of Chadeloid, a non-manufacturer, and then followed the *General Electric* plan, there is no question of illegality. Likewise, if Chadeloid had bought the Kay & Ess patents, then it would have had the right to license and fix the prices in a "one way" contract.

Hence, there is no difference that each company parts title by assignment to New Wrinkle as a means of pro-rating the royalty return and exercising the power of any patent owner in a "one way" contract. This solution was approved in *Standard Oil vs. United States*, 283 U. S. 163.

The distress of Appellant in attempting to change the facts is apparent. There is no subterfuge here—there is no combination of manufacturers working under the guise of a manufacturer dominated trade association or cross-licensing of patents between manufacturers or mere substitutions of a corporation dominated by a group of manufacturers. We agree the Sherman Act "is aimed at substance rather than form." *United States v. Yellow Cab Co.*, 332 U. S. 218, 227. We rely upon that doctrine and do not agree to this theoretical substitution of facts now presented to this Court by the Appellant in an effort to get away from its difficulty.

The case of *United States v. General Instrument Corp.*, 87 F. Supp. 157, is not in point—and the subterfuge was apparent because the corporation was formed by a group of competitive manufacturers. In this case Chadeloid was not a manufacturer and not a competitor commercially with Kay & Ess—**the commercial competition does not enter this case on its own facts.** The *General Instrument* case was a mere subterfuge for a "two way" contract between competing manufacturers.

Point IV (p. 36 Government brief) of the Appellant says it is immaterial whether New Wrinkle was engaged in manufacturing and, therefore, in commerce—this is contrary to its position in Point I (pp. 21, 22).

Appellant ignores the fact that Appellee comes within the exception and exemption of the Patent Laws. It is only when a litigant is outside the Patent Laws that the rule it invokes in Point IV arises to consideration.

We raise the issue of no "commerce" and of no manufacturing by New Wrinkle (admitted by Appellant) as showing no "commerce" called for by the Anti-Trust Laws as one of the elements proving that New Wrinkle activities were solely under the Patent Laws pursuant to the *General Electric* case. Appellant has failed to pursue our point as it did below.

We find it unnecessary to take the "straw man" position set up by the Appellant in Point IV (pp. 15 and 36), that because there was no interstate commerce you can violate the Anti-Trust Laws, but we do say that the absence of such interstate commerce plus the sole use of the Patent Laws justifies our conduct and shows that we have not stepped beyond the Patent Laws.

The cases cited under Point IV need no further comments as they are not applicable to the present situation.

POINT VI.

NEW WRINKLE BY ONLY ISSUING PATENT LICENSES AND NOT MANUFACTURING IS NOT ENGAGED IN "COMMERCE" TO BRING IT WITHIN THE ANTI-TRUST LAWS: PATENT LICENSES ARE EXEMPT FROM THE ANTI-TRUST LAWS BOTH BECAUSE CONTRACTS ARE NOT "COMMERCE" AND BECAUSE PATENT LICENSES PER SE ARE SOLELY WITHIN THE PATENT LAWS.

It has been long held in numerous cases that so long as Congress has enacted statutes exempting patents from the operation of the Anti-Trust Laws, one who stays within the Patent Laws is exempt from any action under the Anti-Trust Laws. Conversely, if one steps outside of the Patent Laws he is subject to the Anti-Trust Laws provided what he does is "commerce."

First, New Wrinkle, whose sole business is in the granting of patent licenses, is within the Patent Law. On that ground alone, it is not subject to the Anti-Trust Laws.

Secondly, the mere entering into contracts across state lines is not in itself, irrespective of the Patent Laws, engaging in "commerce" within the meaning of the Anti-Trust Laws.

It is significant that when this Court found that the practice of insurance violated the Anti-Trust Laws in *U. S. v. Underwriters Assn.*, 322 U. S. 533, a subsequent enactment by Congress of a law exempting insurance from the operation of the Anti-Trust Laws, for a period in the same manner that patents are exempted, this Court's decision that insurance was within the Anti-Trust Laws, was suspended. The Patent Laws derive their authority under Congressional enactment from the Constitution and the Anti-Trust Laws derive their authority under the Commerce clause of the Constitution upon which the Anti-Trust statute has been premised. Both laws have constitutional origin of equal dignity. So long as one stays within the purview of his particular law he cannot be interfered with by the other law.

The logic of our position is further demonstrated by the following authorities. Patents are just as exempt in their use by issuing patent licenses as labor is exempted when acting within the purview of labor laws; and the labor contracts are exempt from the Anti-Trust Laws because of this congressional enactment just as patent license contracts are exempt under Congressional exception by the Patent Laws. It is true in both cases that the issuance of such contracts may ultimately initiate or control the movement of the goods in "commerce" or across state lines, but this Court has held that such contracts are not "commerce" and **are within the exemptions Congress has thrown around these special fields.** Indeed, Congress three times has nullified the decisions of this Court putting labor under the control of the Anti-Trust Laws.

We submit the following authorities are clear support for the proposition that patent licenses are exempted from the Anti-Trust Laws because within the Patent Laws; and secondly, mere contracts are not "commerce" coming within the Anti-Trust Laws.

We marshal the following propositions and their supporting authorities as the foundation of our later argument.

I.

The Anti-Trust Statute is based upon interstate commerce only:

Apex Hosiery Company v. Leader, 310 U. S. 469;
Atlantic Cleaners & Dyers v. United States, 286 U. S. 427;
Anderson v. United States, 171 U. S. 604.

Interstate commerce "is an intensely practical concept drawn from the normal and accepted course of business."

United States v. Yellow Cab Co., 332 U. S. 218, 231 (citing *Swift & Co. v. United States*, 196 U. S. 375, 398; *North American Co. v. S. E. C.*, 327 U. S. 686, 705).

"The Sherman Act was enacted under authority of the commerce clause and is necessarily of no greater dignity than that clause. * * *"

Washington Brewers Institute v. United States (C. C. A. 9), 137 F. 2nd 964, 967.

II.

(a) Merely licensing under the Patent Law is not engaging in commerce. It is a mere legal right to enjoy the

Patent Statute as a matter of law and not a matter of commerce:

"* * * It is true that the mere making of the lease of the machines is not of itself interstate commerce. * * *"

United Shoe Mach. Co. v. United States, 258 U. S. 451, 465;
Ware & Leland v. Mobile County, 209 U. S. 405, 411-13;
Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 253;
Hill v. Wallace, 259 U. S. 44, 69;
Chicago Board of Trade v. Olsen, 262 U. S. 1, 32-3;
Moore v. New York Cotton Exchange, 270 U. S. 593, 604;
Hopkins v. United States, 171 U. S. 578, 588-9, 602.

(b) **A matter of law cannot be a matter of commerce:**

"The question for the courts, however, is not economic, but wholly legal, to wit, the true interpretation of the law as enacted by Congress."

Paramount Pictures v. United Motion Pictures T. O. (C. C. A. 3), 93 F. (2nd) 714, 719;
Industrial Association of San Francisco v. United States, 268 U. S. 64;
Levering & Garrigues Co. v. Morrin, 289 U. S. 103;
United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457;
Local 167 v. United States, 291 U. S. 293;
United States v. Hutchinson, 312 U. S. 219;
Associated Press v. Labor Board, 301 U. S. 103.

(c) Manufacturing and selling or entering into commercial activities may be commerce, but *a patent license*

under the law does not constitute doing business. Patent licenses may relate to things or events in other states than that of their execution, but they do not contain any obligation to engage in any form of interstate commerce.

Ware & Leland v. Mobile County, 209 U. S. 405;
Western Live Stock v. Bureau of Revenue, 303 U. S. 250.

(d). Any dealings between the Kay & Ess Company and New Wrinkle were in the State of Ohio and were not interstate commerce.

Hopkins v. United States, 171 U. S. 578;
United States v. Hutchinson, 312 U. S. 219;
Atlantic Cleaners & Dyers v. United States, 286 U. S. 427.

(e) These contracts of license do not cause any movement of goods or affect the sale of goods as between the licensor and licensee. The act of making any contract which does not stipulate for the performance of an act or transaction of interstate commerce is not in itself interstate commerce. This has been held to be true even though the contract be effected by exchange of communications across state lines;

New York Life Ins. Co. v. Cravens, 178 U. S. 389;
Ware & Leland v. Mobile County, 209 U. S. 405;
New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495.

"The mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce."

Jewel Tea Co. v. Williams (C. C. A. 10), 118 F. (2nd) 202, citing

Lipson v. Socony Vacuum Corporation (C. C. A. 1), 87 F. (2nd) 265;

Moore v. New York Cotton Exchange, 270 U. S. 593;

Ware & Leland v. Mobile County, 209 U. S. 405;

Schechter Corp. v. U. S., 295 U. S. 495.

DISCUSSION OF JURISDICTION.

The Mere Fact That Patent Licenses as Personal Services Deal with Products Shipped in Interstate Commerce Does Not Make Patent Licensing Interstate Commerce.

The foregoing rule has been frequently followed by this Court. The Anti-Trust Laws are based upon interstate commerce only. *United States v. Joint Traffic Association*, 171 U. S. 505, 567, 568, 573. They do not cover personal services, such as invention and licensing of patents, unless the patentee steps out of the patent laws and enters into interstate commerce—**both must concur.** *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604. A patentee's intellectual work protected by statute is in the same category as the work of men who work with their hands. *United Leather Workers International Union, Local Lodge or Union No. 66, et al. v. Herkert & Meisel Trunk Company, et al.*, 265 U. S. 457; *Industrial Association of San Francisco, et al. v. United States*, 268 U. S. 64; *United States v. Yellow Cab Co., et al.*, 332 U. S. 218, 230, 234; holding that taxi cab services engaged locally in transporting passengers travelling from state to state "that such transportation is too unrelated to interstate commerce to constitute a part there, under the meaning of the Sherman Act."

It should be remembered that New Wrinkle, Inc. licensed any person, firm, or corporation with a provision for fixing the minimum sales price of its licensees pursuant to *United States v. General Electric Company et al.*, 272 U. S. 476 in reliance upon that decision, repeatedly affirmed by this Court. *It does not manufacture.*

It merely exercises its legal rights under the patents it owns to license anybody who can use the patents and they may keep their license for as long as the licensee pleases or give it up when it pleases. "The *General Electric* case construes that as giving a right to a patentee to license another to make and vend at a fixed price." *United States v. Line Material Co. et al.*, 333 U. S. 287, 312.

The Government failed to raise, by its appeal, this simple issue and tries to substitute issues not decided by the Court below for reasons this Court will doubtless understand. **Where a licensor does not sell anything in commerce nor ship any goods in commerce nor control anything that a licensee does except that he pays a royalty and must sell at a stipulated minimum price under the patent, only the patent laws apply.**

The original basis of the Motion to Dismiss is the averment in paragraphs I (2) and III (11) that "**New Wrinkle has not engaged in the commercial manufacture and sale of wrinkle finishes at any time since its incorporation in 1937,**" and therefore is not engaged in interstate commerce.

The activities of New Wrinkle, Inc., to be within the prohibition of the Sherman Act, must be a matter of interstate commerce and must be in restraint of trade or commerce among the several states, Sherman Act, Section 1. The Complaint must state a case by showing that two grounds exist which are both essential to sustain a Complaint under the Anti-Trust Acts.

A. Interstate commerce and such interstate commerce which is a part of a larger plan to control interstate markets, *outside of the patent laws.*

Standard Oil Company vs. United States, 283 U. S. 163, 169.

B. Unreasonable restraint of interstate commerce *outside of the patent laws.*

This Appellee's position is that whatever action it has taken has been purely within the scope of its lawful patent monopoly and is neither in interstate commerce nor a violation of the Sherman Act. New Wrinkle has not entered into a conspiracy with any other entity. So long as it stays within the patent laws it cannot be stopped under the Anti-Trust Laws. *United States v. Line Material Co.*, (March 8, 1948), 333 U. S. 287, 304, 307, 308, 309, 310, 312; and cases cited.

The Anti-Trust statute is based upon interstate commerce only: New Wrinkle, Inc. is not so engaged.

Under the doctrine of *Hopkins v. United States*, 171 U. S. 578, and in *Anderson v. United States*, 171 U. S. 604, *a patentee is merely selling the results of his labor in making the invention which he is authorized to do by the government of the United States when he issues a patent license.*

Even if he combines with others he is merely disposing of his personal services by way of a patent license and is not engaging in interstate commerce because he sells nothing that moves as a physical thing in trade. So long as you stay within the patent law and do not step out into any commercial non-patent operation you are not affected by the Sherman Anti-Trust Act.

United States v. Line Material Co., 333 U. S. 287, affirming *United States v. General Electric Co.*, 272 U. S. 476, *United States v. Univis Lens Co.*, 316 U. S. 241, etc.

Where an inventor or his assignee owns the patentable results of his labor, issues license contracts and does no manufacturing, his position is that of any other laborer. In *Apex Hosiery Co. v. Leader et al.*, 310 U. S. 469, this Court held that controlling goods that would be ultimately shipped in interstate commerce and in stopping a business from shipping in interstate commerce was no ground for charging a conspiracy in restraint of trade or commerce between the several states. *United Mine Workers of America et al. v. Coronado Coal Company et al.*, 259 U. S. 344; *United Leather Workers International Union, Local Lodge or Union No. 66, et al. v. Herkert & Meisel Trunk Company et al.*, 265 U. S. 457; *Apex Hosiery Co. v. Leader et al.*, 310 U. S. 469.

Patent licenses are merely a means of selling the technical brains and technical labor of the inventor. As such, it has been the settled law, repeated again in *Apex Hosiery Co. v. Leader, et al.*, 310 U. S. 469, 501, 502, that personal services and the product of personal services and their sale and even a combination of persons among themselves in the sale of their services or the results therefrom is not considered an illegal restraint of trade at common law nor under the Sherman Act, either because it is not thought to be unreasonable or because it was not deemed a restraint of trade.

A stream rises no higher than its source and patents and what they cover constitute no more than the rights of the individual inventors. It is our proposition that an individual inventor has a right under the law to sell or not sell, and to license or not license, and if he licenses to fix the price at which his licensee sells. This Court has said so many times and as recently as in *United States v. Line Material Co.*, 333 U. S. 287, affirming *United States v. General Electric Co.*, 272 U. S. 476. Therefore, having been granted

this right under the patent law to fix prices which is legal *per se* under patents and licenses, being merely the sale of personal services approved by the Supreme Court in the *Apex Hosiery* case as not being the subject of interstate commerce even when individuals combine their services, we respectfully submit that the license contracts under patents assembled together from various inventors in order to open up the rights to all their patents to anybody is not interstate commerce and, even if it were, it could not be a restraint of trade. *Apex Hosiery Company v. Leader, et al.*, 310 U. S. 469, 502:

> "* * * Since the enactment of the declaration in Sec. 6 of the Clayton Act that 'the labor of a human being is not a commodity or article of commerce * * * nor shall such (labor) organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in the restraint of trade under the antitrust laws,' * * * *"

(a) *Merely licensing under the patent law is not engaging in commerce—mere legal right to enjoy the statute* is a matter of law and not a matter of commerce.

The Appellee, New Wrinkle, Inc., has done two things as to which there is no dispute as a matter of fact: first, it has entered into a lease of its patent rights which rental agreement has the technical name under the patent law of a "License." This is authorized by patent law.

Secondly, New Wrinkle, Inc. has placed in its license agreement a requirement that it may specify the price at which its licensees sell the patented wrinkle finishes, but no agreement as to its own price. This is legal as established in *United States v. General Electric Co.*, 272 U. S. 476; *United States v. Univis Lens Co., Inc.*, 316 U. S. 241; and *United States v. Line Material Co.*, 333 U. S. 287.

The foregoing two things are performed under the patent law and are approved by the statutes and the courts.

New Wrinkle, Inc. does not sell anything in commerce nor does it ship any goods in commerce nor does it control anything that a licensee does except that he pays five cents a gallon and must sell at a Licensor *directed* minimum price under the patent.

In *United Shoe Machinery Corp., et al. v. United States*, 258 U. S. 451, 465, this Court held that the fact that United Shoe *leased its machines* and shipped them across state lines and made leases between citizens of different states did not constitute interstate commerce in and of itself. The Court said: "It is true that the mere making of the lease of the machines is not of itself interstate commerce."

Ware, et al. v. Mobile County, 209 U. S. 405.

In each case of the companies licensed by New Wrinkle, Inc, they manufacture their goods in a particular state and sell them from their factories. The license to do so is a mere contract between citizens of different states.

As Mr. Justice Stone said in *Western Live Stock, et al. v. Bureau of Revenue, et al.*, 303 U. S. 250:

> "*That the mere formation of a contract between persons in different states is not within the protection of the commerce clause*, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question. Paul v. Virginia, 8 Wall. 168; Hooper v. California, 155 U. S. 648; New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495; cf. Ware & LeLand v. Mobile County, 209 U. S. 405; Engel v. O'Malley, 219 U. S. 128" (p. 253).

Accordingly, the Court held that "the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce" (p. 258).

In the instant case New Wrinkle, Inc.'s action is finished with granting the license, fixing the licensee price, and supplying any technical information which may help the licensee. Its action is, therefore, "distinct" from the subsequent manufacturer, who is a licensee, whose products may be circulated in interstate commerce.

Contracts for future delivery on a Board of Trade for the movement of goods in interstate commerce "are not in and of themselves interstate commerce." *Hill v. Wallace*, 259 U. S. 44, 69.

This Court followed a settled rule in *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 32-3; *Moore v. New York Cotton Exchange*, 270 U. S. 593, 604; *Hopkins v. United States*, 171 U. S. 578, 588-9, 602, that contracts between citizens of different states and nothing more are not interstate commerce. The fact that as a result physical goods move in commerce across state lines is not controlling.

(b) *As a matter of law license contracts cannot be a matter of commerce.*

In *Industrial Association of San Francisco v. United States*, 268 U. S. 64, Mr. Justice Sutherland held, on behalf of a unanimous court, that contracts between contractors and dealers in building materials, which had the effect of regulating movement of materials in interstate commerce, but *which were separable from such movements*, as in the case of the patent licenses here are separable from the resulting subsequent manufacture and

shipment of wrinkle finishes by the licensees, are not interstate commerce.

Levering & Garrigues Co. v. Morrin, 269 U. S. 103;
United Leather Workers v. Herkert & Meisel Trunk Co., 265 U. S. 457;
Local 167 v. United States, 291 U. S. 293;
United States v. Hutcheson, 312 U. S. 219;
Associated Press v. Labor Board, 301 U. S. 103.

(c) Manufacturing and selling or entering into commercial activities may be commerce, but a patent license under the law does not constitute doing business. They may relate to things or events in other states than that of their execution but they do not contain any obligation to engage in any form of interstate commerce.

In the instant case, the patent laws have for many years authorized such patent licenses. To make such licenses subject to the Sherman Anti-Trust Law, such activities under them must meet two conditions:

(1) To be beyond the authority of the patent laws as interpreted by the Supreme Court of the United States,

(2) To do more than merely constitute contracts between citizens of different states, pursuant to the patent laws, even though they incidentally affect or effect ultimately the movement of licensed goods in interstate commerce.

Therefore, these contracts of license being authorized by the Federal Statutes come within the exception referred to in *United States v. Underwriters Association*, 322 U. S. 533, 560, by Mr. Justice Frankfurter, where he pointed out that if Congress had defined insurance with particularity and had enacted legislation specifically authorizing and controlling such contracts, there would have

been a different result. Logically, therefore, as patent licenses are under statutory authority of the United States they are not subject to the Anti-Trust Laws except where they are used in interstate commerce *outside of the patent laws*[1] as an instrument for which they were not intended or authorized to unreasonably restrain competition.

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[1] "* * * In these circumstances, *we must proceed to determine the issues on the assumption that General Electric continues as a precedent.* Furthermore, we do not think it wise to undertake to explain, further than the facts of this case require, our views as to the applicability of patent price limitation in the various situations listed by the government. On that assumption where a conspiracy to restrain trade or an effort to monopolize is not involved, a patentee may license another to make and vend the patented device with a provision that the licensee's sale price shall be fixed by the patentee. The assumption is stated in this way so as to leave aside the many variables of the General Electric rule that may arise. * * *" (333 U. S. 287, 304.)

"* * * **In the absence of patent or other statutory authorization,** a contract to fix or maintain prices in interstate commerce has long been recognized as illegal *per se* under the Sherman Act. This is true whether (333 U. S. 287, 307) the fixed price is reasonable or unreasonable. It is also true whether it is a price agreement between producers for sale or between producer and distributor for resale. It is equally well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly. * * * The progress of our economy has often been said to owe much to the stimulus (333 U. S. 287, 308) to invention given by the rewards allowed by patent legislation. The Sherman Act was enacted to prevent restraints of commerce but *has been interpreted as recognizing that* **patent grants were an exception.** *Bement v. National Harrow Co., supra,* 92, 21 Cong. Rec. 2457. * * * (333 U. S. 287, 309) *The monopoly granted by the patent laws is a statutory exception to this freedom for competition and consistently has been construed as limited to the patent grant. Ethyl Gasoline Corp. v. United States,* 309 U. S. 436, 452, 455; *United States v. Univis Lens Co.,* 316 U. S. 241; *Hartford-Empire Co. v. United States,* 323 U. S. 386. It is not the monopoly of the patent that is invalid. It is the improper use of that monopoly. (333 U. S. 287, 310.) * * * (Emphasis ours.)

"* * * The patent statutes give an exclusive right to the patentee to make, use and vend and to assign any interest in this monopoly to others. *The General Electric case construes that as giving a right to a patentee to license another to make and vend at a fixed price.* * * *" (333 U. S. 287, 312.)

(d) *Any dealings between The Kay & Ess Company and New Wrinkle, Inc. were in the State of Ohio and were not interstate commerce.*

These contracts of license do not cause any movement of goods or affect the sale of goods as between the licensor and licensee. The act of making any contract which does not stipulate for the performance of an act or transaction of interstate commerce is not in itself interstate commerce. This has been held to be true even though the contract be effected by exchange of communications across state lines:

United States v. Line Material Co., 333 U. S. 287, 304, 308, 309, 310, 312 (March 8, 1948);
New York Life Ins. Co. v. Cravens, 178 U. S. 389;
Ware & LeLand v. Mobile County, 209 U. S. 405;
New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495.

"The mere fact that an anticipated local transaction causes a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce."

Jewel Tea Co. v. Williams (CCA 10), 118 F. (2d) 202, citing *Lipson v. Socony Vacuum Corporation* (CCA 1), 87 F. (2d) 265; *Moore v. New York Cotton Exchange*, 270 U. S. 593; *Ware & LeLand v. Mobile County*, 209 U. S. 405; *Schechter Corp. v. United States*, 295 U. S. 495.

CONCLUSION.

This case raises some fundamental questions of public policy.

First, are we going to limit the right of any patent owner to fix the price of his licensees just because it is not wealthy enough to go into manufacturing? The Government says that only a manufacturer can have this privilege: we say that if it is good for a manufacturer, it should be good for any patent owner without discrimination on the basis of pocketbook size.

The second question is whether we are going to discriminate in favor of large companies, with many subsidiaries, who have tremendous groups of patents produced from vast research laboratories, to have all the advantages of the patent law because the large company can direct its subsidiaries to use their patents and can control their prices; while we say to the individual inventor, or the non-manufacturing patent holding company, that they cannot have the same privilege of licensing manufacturers with a price control with which manufacturers the patent holding company **is not in competition.**

Basically, **we are urging this Court to help us keep open the greatest freedom of use of patents through independent patent holding companies** as in this case. This is the only opportunity today for individual inventors and smaller patent owners, **who cannot afford to go into manufacturing**, to compete with the vast research laboratories of large concerns who have large groups of patents and who have so many subsidiaries that they can control vast segments of industry, and its prices, without any issue being raised at all.

Of course, we do not urge that, because of the size of a man's pocketbook, whether small or large, he can

conspire to violate the Anti-Trust Laws. The facts in the present case, as pleaded by the Appellant, show that could not have taken place in this case. We do vigorously urge the Court to take a look at the grave necessity for making it possible for patents to be utilized by licensing where they are owned by patent holding companies such as New Wrinkle, Inc., and whose intellectual, inventive contributions are so good that an entire industry takes licenses.

New Wrinkle, Inc. has set a pattern for promoting competition by the use of brains and technical abilities recognized by the entire industry in taking licenses and keeping the licenses even though they have the opportunity of canceling them any time they please.

A favorable decision on behalf of New Wrinkle, Inc. will open up a vast intellectual storehouse of industrial property and patents and will result in doing what all legislation can never do; **stimulate the use of the best technical brains of this country by the maximum number of companies who have the means to manufacture under them which the Licensor does not have.**

It is pointless to say to a man that he can invent and get a patent unless he can take action to make it profitable and unless he does, the public will not benefit from the use of the patent. And the individual holder, whether it be a small corporation or a person, unless it can also fix prices to its licensees like a manufacturing corporation, will have a difficult time of licensing if it opens its patents to all comers. We say this because, if a manufacturer, with a competitive group of patents, can offer a price control with his license to his competitors just because he has money enough to be a manufacturer, it is quite obvious that a non-manufacturer, perhaps with even better pat-

ents, cannot secure the licensees without equal privileges which should be open to all.

And likewise, we respectfully submit to the Court that patents should be treated, **first, in the public interest** as we feel sure you do so treat them; and, secondly, we believe in any plan such as now before this Court which will **encourage the unlocking of this intellectual storehouse of American genius and will carry out this general policy of wide use of patents in the public interest.** Such a plan puts the individual, or the smaller organization, a non-manufacturing company, in full competitive position with the vast research laboratories who are equipped to "manufacture" large numbers of patents and lock them up or use them only for their own benefit in their own organizations.

That is really the basic issue in this case.

Respectfully submitted,

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